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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

DELTA AIRLINES, INC.,
Petitioner,

vs.

MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA MAGEL, on behalf of themselves and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an award of attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964 should be apportioned to reflect the extent to which the plaintiff did not prevail on the issues and claims presented in the litigation.[1]

2. Whether expenses for expert witnesses, consultants and investigators, and other litigation expenses not included by Congress as recoverable costs under 28 U.S.C. § 1920, are "costs" that may be awarded in actions under Title VII of the Civil Rights Act of 1964.

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[1]Certiorari has been granted by this Court on a similar question in *Hensley v. Eckerhart*, No. 81-1244, ... U.S. ...., 71 L.Ed.2d 847, 50 U.S.L.W. 3695 (March 1, 1982). The question presented in *Hensley* is whether an award of attorney's fees made pursuant to 42 U.S.C. § 1988 should be proportioned to accurately reflect the extent to which the plaintiff has prevailed on the merits of his lawsuit in the district court. See discussion at pages 10-11, *infra*.

PARTIES

The parties to the proceedings below were 1) the individual plaintiffs, Margaret Thornberry, Patricia Farmer, Delores O'Sullivan, and Linda Magel; 2) a class of all women employed by Delta Air Lines, Inc. in its Marketing and Traffic departments nationwide; and 3) defendant Delta Air Lines, Inc., petitioner here. The attorney's fee and cost award involved in this petition ran in favor of plaintiffs' counsel Carroll, Burdick & McDonough and Gerald E. Magaro.

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MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA MAGEL, on behalf of themselves and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Delta Air Lines, Inc., respectfully petitions that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on May 5, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as corrected and modified, is officially reported at 676 F.2d 1240. Except for correction of typographical and citation errors, the original opinion of May 5, 1982, is identical to the corrected opinion filed on May 13, 1982. The court's May 13, 1982 opinion, and its orders of June 4, 1982, and July 14, 1982, modifying and amending the opinion, are included in the appendix hereto, as is the Court of Appeals' order of June 17, 1982 denying Petitioner's petition for rehearing and suggestion of a rehearing en banc. (Appendix A)

The district court's opinion is not officially reported. It is unofficially reported at 25 EPD ¶ 31,496. The opinion is reprinted in the appendix to this petition. (Appendix B)

Other opinions of the district court relevant to this petition are not officially reported. The district court's order approving the parties' settlement agreement in the underlying action and dismissing the claims of the plaintiffs and the class is unpublished. The texts of the order and the settlement agreement are included in the appendix to this petition. (Appendix C) The court's order dismissing plaintiffs' maternity leave and other benefits claims also is unpublished but is included in the appendix. (Appendix D) The court's class certification opinion and order is unofficially reported at 16 EPD ¶ 8294. (Appendix E) The court's ruling on Petitioner's motion to dismiss and transfer venue is unofficially reported at 27 FEP Cases 1203 and 13 EPD ¶ 11,513. (Appendix F)

JURISDICTION

The jurisdiction of the district court originally was invoked under Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), and under the Equal Pay Act of 1963, 29 U.S.C. § 216(b).

The judgment of the Court of Appeals was entered on May 5, 1982. The Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc on June 17, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The attorney's fee provisions of Title VII of the Civil Rights Act of 1964 are contained in § 706(k) of the Act, 42 U.S.C. § 2000e-5(k), which states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Congress' authorization regarding the taxation of costs in the federal courts is codified at 28 U.S.C. § 1920. This section states:

> § 1920. Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

This case arises from an award of $218,913.00 in attorney's fees and $83,918.51 in "costs" in a multiple issue, multiple claim class action under Title VII of the Civil Rights Act of 1964 that was settled on the eve of trial. At the time the case was settled, the plaintiffs were attacking a total of 29 separate and distinct employment policies and practices of Petitioner. The policies and practices under attack involved various aspects of the recruitment, hiring, training, employee evaluation, transfer, promotion, compensation, discipline, benefits, and termination practices in Delta Air Lines' Marketing and Traffic departments and their offices throughout the United States. Many

of the policies and practices also involved other departments and divisions of the company. Claims were asserted under both Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

Neither the plaintiffs nor the district and circuit courts disputed the fact that the settlement agreement entered by the parties and approved by the district court did not address in any fashion, much less remedy, the vast majority of issues and claims litigated in the case.[2] Nor was it disputed that Petitioner unequivocally had prevailed on several of the issues and claims litigated by obtaining dismissal of the claims during the pendency of the suit.[3]

Despite these facts, the district court awarded plaintiffs' counsel an attorney's fee that was based upon 100% of

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[2]Petitioner demonstrated in its briefs below that, of 29 separate class claims raised by plaintiffs, a total of 27 were wholly ignored by the prospective relief provisions of the settlement. Only two were addressed in any fashion, and even then the prospective relief obtained by the settlement admittedly was much less than plaintiffs sought. (See Appendix G) A claims procedure established by the settlement resulted in no class member receiving any monetary or other relief of any kind for past company conduct.

[3]The court dismissed plaintiffs' class claims under the Equal Pay Act and plaintiffs' individual and class claims under state law pursuant to Petitioner's motion to dismiss. (Appendix F) In its class certification order, the court rejected plaintiffs' claims on behalf of unsuccessful applicants for employment and persons employed outside the Traffic and Marketing departments. (Appendix E) After the Pre-Trial Conference, the court granted Petitioner's motion to dismiss plaintiffs' maternity leave and other benefits claims (Appendix D)

the time they spent on the case plus a 20% bonus. It gave no explanation for its rejection of Petitioner's objection that no award should be given for time spent on the claims and issues upon which the plaintiffs did not prevail. The district court also awarded plaintiffs a total of $83,804.87 in "costs", including $66,673.75 in consulting fees, expert fees, and computer expenses attributable to their work, and $7,387.65 in miscellaneous "out-of-pocket" expenses.[4] The court held that it had inherent equitable powers and discretion to award these expenses as costs even though they are not allowed by 28 U.S.C. § 1920.[5]

On appeal, the Ninth Circuit affirmed the district court's award in its entirety. The court theorized that the case attacked a single injury, "gender discrimination"; it therefore held to be "irrelevant" the fact that plaintiffs had not prevailed on a large number of the claims and issues litigated.[6] In so ruling, the court held that a plaintiff

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[4]These items included expenses for messengers, postage, supplies, secretarial services, photocopying, and long distance telephone charges.

[5]The award also included an additional $3,715.63 for paralegal time and $2,700 in fees for time spent preparing the fee petition.

[6]On July 14, 1982, after issuing its mandate, the court modified its language somewhat stating instead that the failure of the plaintiffs to obtain all of the relief sought "does not necessarily require a reduction in the amount to be awarded." The court did not alter its basic rationale that, where "gender discrimination" is the theory of the action, no reduction is appropriate, even if the plaintiffs did not prevail on all issues and claims. Consequently, in Title VII cases at least, the court still is of the opinion that a plaintiff's failure to prevail on all or most of the claims presented is irrelevant.

who prevails on part of a Title VII class action is entitled to a fee "for all time reasonably expended on the matter" even if the party did not succeed on all of the claims and issues litigated. The court further held, contrary to statutory limitations on recoverable costs, that district courts have discretion to award out-of-pocket costs and expenses to a prevailing party, to allow plaintiffs to recover their full litigation costs, and to award consultant and expert expenses incurred because of "the practical litigation needs of the party."

Petitioner thereafter filed a petition for rehearing and suggestion for rehearing en banc, pointing out that the court's rulings on the attorney's fee and cost questions variously conflicted with United States Supreme Court authority, authority in other circuits, and previous decisions of the Ninth Circuit. On June 17, 1982, the court denied the petition for rehearing without comment.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Allowing A Fee Recovery For All Time Spent On A Case, Including Time Spent On Issues Upon Which The Party Does Not Prevail, Conflicts With Decisions In Other Circuits

In holding that a plaintiff who settles a Title VII class action is entitled to recover fees for all time spent on the case, including time spent on issues and claims upon which the party clearly did not prevail, the decision below conflicts with the decisions of other circuit courts which

have specifically held that a prevailing party in litigation under Title VII and other civil rights statutes is *not* entitled to recover an attorney's fee and cost award for time and money spent on issues and claims upon which the party did not prevail. For example, in *Copeland v. Marshall*, 641 F.2d 880, 891-92, 902-03 (D.C.Cir. 1980), the District of Columbia Circuit, sitting en banc, held: "First, no compensation should be given for hours spent litigating issues upon which the plaintiff ultimately did not prevail." The court recently reaffirmed this principle in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982), where it held, "Fees are not recoverable for non-productive time nor, at least in the context of Title VII and FOIA, for time expended on issues on which plaintiff did not ultimately prevail."

In *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the First Circuit in a frequently cited case under 42 U.S.C. § 1988,[7] stated: "Plaintiffs may be considered prevailing parties for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing the suit. However, the amounts of the attorney's fees they receive should be based on work performed on the issues in which they were successful."

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[7]As this Court noted in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70n9 (1980), Section 1988 is "similar in purpose and design to Title VII's fee provision."

The Seventh Circuit has adopted the same rule. In *Muscare v. Quinn*, 614 F.2d 577, 580 (7th Cir. 1980) and *Bushe v. Burkee*, 649 F.2d 509, 521-22 (7th Cir. 1981), the court rejected the "all time reasonably spent" approach adopted here by the Ninth Circuit, holding that fees should be awarded only for the preparation and presentation of the claims upon which a plaintiff is determined to have prevailed. Indeed, in *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183, 187 (7th Cir. 1979), the court held that, where each party prevails on different issues in the litigation, "it seems sound to award fees to neither."

In *Hughes v. Repko*, 578 F.2d 483, 487 (3rd Cir. 1978), the Third Circuit held that a fee-petitioner "cannot be treated as the prevailing party to the extent he has been unsuccessful in asserting a claim," and explained that any other interpretation "would run counter to the spirit of the Awards Act provision that attorney's fees should be awarded to the 'prevailing' party."

Several circuits also have held that an award of attorney's fees must be apportioned to reflect the extent to which the plaintiff prevails in the litigation. *Williams v. General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974); *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978); *Sangster v. United Airlines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980); *Muller v. United States Steel Corp.*, 509 F.2d 923, 930 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

In holding here that plaintiffs were entitled to an award for "all time reasonably spent" on the case, the Ninth

Circuit ignored these cases and instead simply chose a different rule, adopting language from a decision of the Sixth Circuit in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), a case in which the plaintiffs obtained all of the relief they sought by successfully enjoining the maintenance of a segregated school system. The court in *Northcross* refused to deduct from the fee award time spent on secondary legal theories rejected by the district court, holding that, unless the positions advanced were frivolous or in bad faith, the plaintiff's attorney should be compensated "for all time reasonably expended on a matter." *Id.* at 636.

The decision of the Ninth Circuit that a plaintiff who settles a Title VII class action is entitled to recover "for all time reasonably spent" on the case, including time spent on issues and claims on which the party clearly did not prevail, is in clear conflict with decisions of the First, Third, Seventh and District of Columbia circuits.[8] It is supported to some extent by a Sixth Circuit decision that arose in a different context. The conflict in the deci-

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[8]Paradoxically, at least two previous decisions of the Ninth Circuit also conflict with its ruling in the present case. In *Sethy v. Alameda County Water District*, 602 F.2d 894 (9th Cir.), *cert. denied*, 444 U.S. 1046 (1981), the court adopted the First Circuit's holding in *Naudeau, supra*, and ruled that the amount of attorney's fees a prevailing party receives "should be based on the work performed on the issues in which they were successful." In *Bartholomew v. Watson*, 665 F.2d 910, 914-15 (9th Cir. 1982), the court had held that, in a multi-claim, multi-issue case, payment for all time reasonably spent on the case when the plaintiffs prevail on only some of the issues "clearly is contrary to the test set forth in *Sethy*." *Id.* at 914.

sions of the circuits should be resolved and can only be resolved by this Court.

As previously noted (see note 1, *supra*), certiorari recently was granted by this Court on a similar question under 42 U.S.C. § 1988 in *Hensley v. Eckerhart*, No. 81-1244, ... U.S. ....., 71 L.Ed.2d 47, 50 U.S.L.W. 3695 (March 1, 1982). Apart from the fact that the cases involve different, albeit similar, statutes, the present case in several respects presents a better record and background for review by this Court than does *Hensley*. The issues presented and the conflicts between the circuits are more clearly defined in this case because the Eighth Circuit in *Hensley* did not issue a written opinion defining its theories and approach. The Ninth Circuit's opinion here presents a well-defined difference in philosophy and approach from that adopted by several other circuits. The present case also presents a relatively clear and unequivocal failure by the District Court and the Court of Appeals to remove from the attorney's fee calculation time spent on claims and issues upon which the plaintiffs did not prevail. Finally, this petition presents an important question not included in *Hensley*—the scope of "costs" recoverable in cases of this type. Both cases, however, present similar, important questions under different federal statutes, and this Court's recognition of the importance of the issue in *Hensley* is equally appropriate here.

Petitioner therefore respectfully requests this Court to grant certiorari in the present matter and to set the case for hearing at the same time as *Hensley*. At that time, the

issues raised in both matters could be considered together and decided in a single opinion.[9]

II. The Court of Appeals' ruling that federal courts have discretion to award as costs out-of-pocket expenses not included in 28 U.S.C. § 1920 conflicts with the statute, precedent in this Court, and decisions in other circuits

In holding that federal courts have equitable discretion to award as "costs" expenditures for consultants and experts, and any other expenditures that result from "the practical litigation needs of the party," the court of appeals placed itself in conflict not only with statutory limitations on recoverable costs, but also with prior decisions of this Court and decisions in other circuits.

In 1931, this Court rejected the existence of any equitable authority in the lower courts to allow expert witness fees to be taxed as costs, stating, "Specific provisions as to amounts payable and taxable as witness fees were made by Congress as early as the Act of February 28, 1799," and noting that under these and subsequent provisions, "[A]dditional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the Federal Courts." *Henkel v. Chicago, St. P.M.&O.R. Co.*, 284 U.S. 444, 446-47 (1931).

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[9]Alternatively, Petitioner requests this Court to grant certiorari and to hold the present case in abeyance pending its decision in *Hensley*. At that point, the Court could determine whether further proceedings were required in this case or whether it could simply remand the matter for further consideration in light of the decision in *Hensley*.

The absence of any equitable discretion or authority generally to award as costs expenses beyond those allowed by 29 U.S.C. § 1920 also was addressed by this Court in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964). There, the Court rejected the existence of any inherent authority to award a prevailing party witness expenses beyond those allowed by statute, stating, "We do not read that Rule [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case." More recently, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Court held that expansion of the term "costs" beyond those items statutorily authorized by Congress is inappropriate. Although the case directly involved awards of attorneys' fees as "costs," the statutory history discussed by the Court is equally applicable to other awards of expenses beyond those expressly authorized.

Pursuant to the statutory limitations and the foregoing precedent, and contrary to the court of appeals' decision below, the circuit courts traditionally have held that federal courts do *not* have discretion to tax as costs expenses for consultants, experts and investigators.[10] Several cir-

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[10]*See, e.g., Baum v. United States*, 432 F.2d 85, 86 (5th Cir. 1970) ("Expert witness fees, above subsistence and travel, will not be taxed against the losing party."); *Wehr v. Burroughs Corp.*, 477 F.Supp. 1012, 1022 (E.D. Pa. 1979), *aff'd*, 619 F.2d 296 (3rd Cir. 1980) (denying expert witness fees in an age discrimination case and holding that even experts who testify at trial are entitled only to subsistence and mileage); *Twentieth Century Fox Film*

cuits also have rejected the existence of any discretion to award other types of litigation expenses (*e.g.*, postage, messengers, telephone, travel, typing, supplies, office photocopy, etc.) not included by Congress in 28 U.S.C. § 1920.[11] On the other hand, the decision below is supported by the Sixth Circuit's *Northcross* decision, *supra*, and in part by a recent decision of the Fifth Circuit.[12]

The court of appeals' ruling that federal courts have equitable discretion to award as costs any and all expenses that are incurred as a result of "the practical litigation needs of the party," regardless of whether the expenses are within the scope of costs allowed by § 1920, invites the district courts to expand the scope of recoverable costs far beyond those allowed by Congress and traditionally awarded in the federal courts. The decision conflicts with federal statute, with decisions in several other circuits, and with principles previously established by this Court. The conflict between the circuits makes it difficult for practi-

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Corp. v. Goldwyn, 328 F.2d 190, 223-24 (9th Cir. 1969) (denying expert witness fees in an antitrust case even though they had been incurred as a necessary part of the plaintiff's case). *See also*, 6 *Moore's Federal Practice*, ¶ 54.77 [5.-3], at 1734, 1741, 1751 (2d ed. 1982); 10 *C.Wright & A.Miller, Federal Practice & Procedure*, § 2678, at 236-37 (1973).

[11] *Wahl v. Carrier Manufacturing Co.*, 511 F.2d 209, 217 (7th Cir. 1975); *Kinsey v. Legg Mason Wood Walker*, 23 FEP Cases 774, 777 (D.D.C. 1978), *aff'd.*, 605 F.2d 572 (D.C. Cir. 1979); *City Bank of Honolulu v. Rivera Davila*, 438 F.2d 1367, 1371 (1st Cir. 1971). *See generally*, 6 *Moore's Federal Practice*, ¶ 54.77[8], at 1751 (2d ed. 1982); 10 *C.Wright & A.Miller, Federal Practice & Procedure*, § 2677, at 223-228 (1973).

[12] *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981).

tioners and the lower courts to adopt a consistent approach to the ever-present question of recoverable costs and therefore should be resolved by this Court.

III. The award of fees and costs under "prevailing party" statutes is an important question of federal law that arises with increasing frequency in the district and appellate courts and should be addressed by this Court

There are numerous federal statutes in addition to Title VII which provide for an award of attorney's fees to the prevailing party in litigation under the statute. Because of a recent increase in the number of these statutes, attorney's fee applications have become part of the daily fare of the lower courts. These applications will become even more frequent as a result of the recent enactment of the Equal Access to Justice Act, 28 U.S.C. § 2412.

As noted by the Third Circuit in *Hughes v. Repko, supra,* the Ninth Circuit's approach of allowing fees for all time spent on a case and recovery of all expenses reasonably incurred is directly at odds with the "prevailing party" provisions of the statutes. 578 F.2d at 487. This fact alone makes the questions here presented significant.

Additionally, the effect of the ruling below is to reward an unfocused, shotgun approach to litigation by encouraging a plaintiff's attorney to raise as many issues, arguments and claims as possible, hoping that, if even one succeeds or if the case settles, he will recover a fee award for all time spent on the case. This approach substantially increases the complexity and cost of litigation, burdens

the parties and the courts, and thereby impairs the administration of justice.

On a more practical level, guidance from this Court on these issues is needed to facilitate analysis and resolution of an increasingly significant subject of federal litigation. The task of practitioners in advising their clients and attempting to resolve these matters out of court, and of the district and appellate courts in deciding the disputed matters brought before them, are made much more difficult by conflicting opinions between the various circuits on the basic questions involved. The absence of any guidelines from this Court exacerbate the problem. Resolution by this Court of the questions here presented will lessen the significant amount of confusion that presently exists in the area and, by obviating further litigation over the most basic questions involved in fee applications, will facilitate resolution of attorney's fee disputes and promote judicial efficiency and economy.

CONCLUSION

In order to resolve the conflicts among the circuits and to clarify the fundamental principles applicable to attorney's fee petitions under Title VII and other prevailing party statutes, Petitioner prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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BRONSON, BRONSON & MCKINNON
Attorneys for Petitioner

DATED: August 2, 1982.

(Appendices follow)

Appendix A

Corrected Opinion of Ninth Circuit Court of Appeals, May 13, 1982.

United States Court of Appeals
For the Ninth Circuit

Nos. 81-4182
81-4197
DC No. CV 76-798

Margaret Thornberry, Patricia Farmer,
Delores O'Sullivan, and Linda Magel,
on behalf of themselves and all
others similarly situated,
Plaintiffs-Appellees/Cross-Appellants,

v.

Delta Air Lines, Inc., a corporation,
Defendant-Appellant/Cross-Appellee.

CORRECTED OPINION
Filed May 13, 1982

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding
Argued and Submitted February 10, 1982

Before: Farris, Ferguson and Nelson, Circuit Judges,
Ferguson, Circuit Judge:

Several appeals and cross-appeals are involved in this case. All of the appeals and cross-appeals, however, are directed to the appropriateness of the amount of attorneys' fees awarded to attorneys representing a class of female employees in a Title VII suit against Delta Air Lines.

The suit resulted in a settlement with Delta which provided for a claims procedure to provide Delta employees with open-ended relief from sex discrimination, a complaint process within Delta's employment structure to deal with any sex discrimination complaints which might arise in the future, changes in job description and promotional opportunities for women, and an explicit monetary settlement for the four named plaintiffs. The agreement also provided for payment to attorney for the handling of claims pursuant to the claims procedure. With respect to the issue of plaintiffs' attorneys' fees and costs during litigation, the agreement provides as follows:

> After final approval of this agreement, the parties shall negotiate concerning the amount of the costs, including attorneys' fees, to be awarded, subject to court approval. Should the parties fail to agree on this issue within thirty-five (35) days of final approval of the Settlement Agreement, and no appeal having been taken from the approval order, plaintiffs may file a motion according to the court's regular calendar procedures seeking an award of costs, including reasonable attorneys' fees.

After the parties failed to reach agreement concerning the amount of plaintiffs' attorneys' fees and costs within the stipulated 35-day period, plaintiffs applied to the court for an appropriate award. The total amount of fees sought by plaintiffs was $409,846.88. In addition, plaintiffs sought reimbursement for costs incurred by them in the litigation in the amount of $90,571.92. The court entered judgment on December 5, 1980 in favor of plaintiffs in the amount of $224,334.88 for attorneys' fees and $83,918.51 for costs incurred in the prosecution of the action.

Delta filed this appeal from that judgment. Plaintiffs cross-appealed from the portion of the court's subsequent orders of December 5, 1980 denying $6,653.41 in travel expenses, and March 31, 1981 granting them only $2,700.00 in additional fees.

The trial court has broad discretion to determine reasonable attorneys' fees and costs. Such a decision is not to be disturbed except for abuse of discretion. Under this narrow standard of review, we reject both the appeal and the cross-appeal, and affirm the judgment and subsequent orders of the district court.

The only real issue in this case is whether the district court abused its discretion in awarding the stated amount to the plaintiffs.

Title VII confers statutory authority on the court to award attorneys' fees. Section 706(k), 42 U.S.C. § 2000(e)-5(k). The trial court's broad discretion to determine reasonable attorneys' fees has been well recognized by the circuits. *Sangster v. United Air Lines, Inc.*, 663 F.2d 864 (9th Cir. 1980); *In re Gypsum Antitrust Cases*, 565 F.2d 1123 (9th Cir. 1977); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972). In *Schaeffer v. San Diego Yellow Cabs*, the Ninth Circuit emphasized that the allowance of reasonable fees in Title VII cases is an important feature of the enforcement provisions of the act. The Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), stated that the amount of the award should not be so niggardly that the award would discourage others seeking to attack discriminatory practices. The trial court must consider the congressional

objective of giving victims of discrimination access to the courts when determining an appropriate fee award.

Due to the trial judge's familiarity with the litigation, review of the trial court's exercise of discretion in awarding attorneys' fees is narrow. The District of Columbia Court of Appeals, en banc, stated:

> It is common learning that an attorney's fee award by the District Court will be upset on appeal only if it represents an abuse of discretion. We customarily defer to the District Court's judgment because an appellate court is not well situated to assess the course of litigation and the quality of counsel. The District Court judge, by contrast, closely monitors the litigation on a day-to-day basis. The Supreme Court long ago observed that a trial judge "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees v. Greenough,* 105 U.S. 527, 537, 26 L.Ed. 1157 (1882). Accordingly, we think "it is better to have th[e] discretion [to award fees] exercised by the court which has been most intimately connected with the case."

Copeland v. Marshall, 641 F.2d 880, 901 (D.C. Cir. 1979). Likewise, the Ninth Circuit has held:

> In reviewing the court's exercise of its discretion, we are not to "substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily." *Patterson v. Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied,* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976), and such evidence must constitute a "clear showing" of abuse of discretion, *Flinn v. FMC Corp.,*

528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied,* 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976).

In re Gypsum Antitrust Cases, supra, 565 F.2d at 1128.

In the instant case, Judge Peckham closely monitored the litigation over a period of approximately five years, and carefully considered the evidence on attorneys' fees.

In determining the amount of fees to be awarded in Title VII litigation, courts have adopted two overlapping frameworks of analysis: the lodestar approach, *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3rd Cir. 1973), and the *Johnson* approach, *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). Both the *Johnson* and the lodestar approach are consistent with the legislative intent of the statutory fee provision of Title VII.

In the instant case, the district court combined the two approaches. First, Judge Peckham weighed a number of the factors listed in *Johnson,* such as the customary fee charged by plaintiffs' attorneys for similar work, the range of fees for similar work performed by attorneys in the geographical area, and the special expertise of plaintiffs' counsel in employment discrimination cases. In so doing, Judge Peckham determined the legitimate hourly rate.

Having determined the base rate, the court then determined the reasonableness of attorney time spent on the case. The court then multiplied the hours claimed by the hourly rates that it had determined to be reasonable for each attorney to arrive at the lodestar figure.

After arriving at the lodestar figure, the court concluded that the results obtained by the plaintiffs' attorneys were significant and therefore there was no need to accept Delta's suggestion that the lodestar figure be adjusted downward by 10% because the attorneys' gains were negligible.

Moreover, the court did not err by refusing to limit the percentage amount of the pecuniary award. In *Harkless v. Sweeny Independent School District*, 608 F.2d 594 (5th Cir. 1979) the court stated:

> [T]he statute provides that a "prevailing party" should receive attorney's fees when the trial court deems it appropriate, and does not limit those fees to the amount recovered by the plaintiff. The purpose of the Attorney's Fees Award Act—to encourage private enforcement of the civil rights laws — would be thwarted by a limitation such as that proposed by the appellants, and no such restriction is suggested by the legislative history of the Act.

Id. at 598. The Ninth Circuit has agreed with this reasoning. *Manhart v. City of Los Angeles*, 652 F.2d 904 (9th Cir. 1981) (substantial attorney fee award upheld by Ninth Circuit despite absence of any back pay whatsoever).

Not only is the amount of back pay not determinative in an attorney's fee award, it is also irrelevant that plaintiffs did not obtain every form of relief sought. In *Manhart v. City of Los Angeles*, the Ninth Circuit held that a Title VII fee award cannot be deemed excessive because it included fees for time spent in preparing claims which were dismissed by the district court. The court stated:

> [P]laintiffs pursued several claims to remedy the same injury, gender discrimination. Under those circumstances, plaintiffs are entitled to an award for all time spent in pursuit of their ultimate goal. *Copeland v. Marshall*, 641 F.2d at 892 n.18; *Lamphere v. Brown University*, 610 F.2d 46, 47 (1st Cir. 1979); *see Seattle School District v. Washington*, 633 F.2d 1388, 1349 (9th Cir. 1980).

652 F.2d at 909.

In *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), the trial court's reduction of fees, because plaintiff had not prevailed in some issues, was reversed on appeal:

> This approach is not proper under the Fees Award Act. The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. . . . Congress has mandated that a prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter."

611 F.2d at 636.

Moreover, it is perfectly acceptable for the court to compensate the time plaintiffs' attorneys spent in administrative proceedings which were relevant and beneficial in preparing the Title VII claim. Courts frequently allow compensation for work done in such proceedings.

> Attorneys' fees are an integral part of the remedies which Congress envisioned to assure the elimination of discrimination and to effectuate civil rights policies . . . The groundwork of many cases which come to court is laid at the administrative level, and the absence of adequate representation can adversely affect the subsequent court proceedings. Thus, where a civil action is initiated, and plaintiff prevails, the Court has discretion to award attorneys' fees for all work that was undertaken to vindicate a plaintiff's right to be free of discrimination.

Reyes v. Mathews, 13 Empl. Prac. Dec. (CCH) ¶ 11,365 (D.D.C. 1976).

In this case, representation of plaintiffs at the unemployment compensation hearings was critical to the success of their subsequent court proceedings. Both terminations involved elements of alleged reprisal for Title VII-related activities.

Judge Peckham also acted within his discretion by awarding out-of-pocket costs and expenses sought by plaintiffs in their application for attorneys' fees. In *Northcross v. Board of Education,* 611 F.2d 624 (6th Cir. 1979), the court stated:

> Some expenses are included in the concept of attorneys' fees, as "incidental and necessary expenses incurred in furnishing effective and competent represen-

> tation," and thus are authorized by § 1988 [Attorneys' Fees Act]. *See* remarks of Congressman Drinan, 122 Cong. Rec. H12160 (Daily ed. 1 Oct. 1976), *Beazar v. New York City Transit Authority,* 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). The authority granted in section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988.

611 F.2d at 639.

A similar approach was taken in *Reynolds v. Abbeville County School District,* 17 Empl. Prac. Dec. (CCH) ¶ 3889 (D.S.C. 1978). In that case, the court awarded "litigation related expenses," including travel expenses, photocopying, and telephone calls. Perhaps the most important justification for awarding costs like these is that the refusal to compensate such costs would make it difficult, if not impossible, to effectuate the purpose of Title VII, which has been characterized by the Supreme Court as follows: "To make persons whole for injuries suffered on acount of intentional employment discrimination. This is shown by the very fact that Congress took care to arm the courts with *full equitable powers.*" *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975) (emphasis added).

Needless to say, the clearly expressed legislative intent cannot be effectuated unless the court has the option to allow plaintiffs to recover the full costs of litigation.

Those costs which are not considered a part of attorney's fees, and those not within the ambit of the "liberal construction" rule which governs the application of § 1988, require a different analysis. *See Northcross, supra,* 611 F.2d at 639-40. Unlike attorney's fees, taxation of these costs, which include consulting and expert witness fees, lies within the trial court's discretion. *Id.* at 640. The exercise of that discretion may not be unlimited, however. We note that *Chapman v. Telephone & Telegraph Co.,* 455 F. Supp. 77, 83-84 (N.D. Cal. 1978), contains language suggesting that these elements of cost may only go beyond the statutory "limits" (subsistence and transportation) in the presence of special circumstances. *See* F.R.Civ.P. Rule 54(d); 28 U.S.C. §§ 1281, 1920. *See also Baum v. United States,* 432 F.2d 85 (5th Cir. 1970). It is clear, however, that the required "special circumstances" are largely a matter of the reasonable needs of the party in the context of the litigation. Thus, in determining whether or not special circumstances exist, the judge must look to the practical litigation needs of the party. For instance, in *EEOC v. Datapoint Corp.,* 412 F. Supp. 460, 410 (W.D. Tex. 1976), *affirmed in part and remanded in part on other issues,* 570 F.2d 1264 (5th Cir. 1978), the court found "that the testimony and trial preparation incident thereto of each of the aforementioned experts was necessary to defendant's defense and that fees and expenses incurred by *Datapoint* in connection with the employment of these experts was reasonable." In the instant case, the trial court found that the testimony of the expert computer witnesses was essential both to prove the plaintiff's prima facie case through the use of statistics and to rebut the defendant's "lack of

interest" defense. That finding is adequately supported by the record, and satisfies us that the trial court properly considered the relationship between the claimed consulting and expert witness fees and the reasonable needs of the litigation. We therefore hold that the trial court's determination with respect to those fees was within its discretionary authority. Since the trial court's decision can only be overturned for abuse of discretion, *see Northcross, supra,* 611 F.2d at 640, we affirm the award.

In conclusion, there is no evidence to show that Judge Peckham abused his discretion. If anything, the evidence is all on the other side, that the judge made a careful analysis of the appropriate award of attorneys' fees. Judge Peckham's award is upheld.

Affirmed.

Order of Ninth Circuit Court of Appeals Modifying Corrected Opinion, June 4, 1982.

United States Court of Appeals
For the Ninth Circuit

Nos. 81-4182
81-4197
DC No. CV 76-798

Margaret Thornberry, Patricia Farmer,
Delores O'Sullivan, and Linda Magel,
on behalf of themselves and all
others similarly situated,
Plaintiffs-Appellees/
Cross-Appellants,
v.
Delta Air Lines, Inc.,
a corporation,
Defendant-Appellant/
Cross-Appellee.

ORDER MODIFYING OPINION
[Filed June 4, 1982]

Before: Farris, Ferguson and Nelson, Circuit Judges

The sentence on page 3, lines 11-15, of the typewritten opinion, which reads:

> The Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 40 (1968), stated that the amount of the award should not be so niggardly that the award would discourage others seeking to attack discriminatory practices.

is amended to read as follows:

> The Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), stated that the amount of the award should not be so low that the award would discourage others seeking to attack discriminatory practices.

Order of Ninth Circuit Court of Appeals Denying Petition for Rehearing and Rejecting Suggestion of Rehearing En Banc, June 17, 1982.

United States Court of Appeals
For the Ninth Circuit

Nos. 81-4182
81-4197
DC No. CV 76-798

Margaret Thornberry, Patricia Farmer,
Delores O'Sullivan, and Linda Magel,
on behalf of themselves and all
others similarly situated,
Plaintiffs-Appellees/Cross-Appellants,

v.

Delta Air Lines, Inc., a corporation,
Defendant-Appellant/Cross-Appellee.

Order

[Filed June 17, 1982]

Before: Farris, Ferguson and Nelson, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Order of Ninth Circuit Court of Appeals Amending Corrected and Modified Opinion, July 14, 1982.

United States Court of Appeals
For the Ninth Circuit

No. 81-4182
81-4197
DC No. CV 76-798

Margaret Thornberry, Patricia Farmer,
Delores O'Sullivan, and Linda Magel,
on behalf of themselves and all
others similarly situation,
Plaintiffs-Appellees/Cross-Appellants,

v.

Delta Air Lines, Inc., a corporation,
Defendant-Appellant/Cross-Appellee.

Order

[Filed July 14, 1982]

Before: Farris, Ferguson and Nelson, Circuit Judges

It Is Ordered that the sentence at the bottom of column 1, page 2036, of the slip opinion be amended to read as follows:

> The fact that plaintiffs did not obtain every form of relief sought does not necessarily require a reduction in the amount to be awarded.

Appendix B

Memorandum and Order of United States District Court for the Northern District of California awarding attorneys fees and costs, December 5, 1980.

In the United States District Court
For the Northern District of California

No. C-76-798 RFP

Margaret Thornberry, et al.,
Plaintiffs,
v.
Delta Air Lines, Inc.,
Defendant.

MEMORANDUM AND ORDER

[Filed Dec. 5, 1980]

This is a sex discrimination class action suit brought against Delta Airlines on behalf of a nationwide class of females employed in the Traffic and Sales/Marketing Department of Delta's Marketing Division. The suit, filed in April of 1976, concluded in October of 1979 with a settlement agreement reached only a few days prior to the trial date. This court approved the settlement agreement on March 13, 1980.

The following clause regarding the payment of attorneys' fees was included in the settlement:

> XI. Attorneys' Fees and Costs
> After final approval of this agreement, the parties shall negotiate concerning the amount of the cost, including attorneys' fees to be awarded, subject to Court approval. Should the parties fail to agree on this issue within thirty-five (35) days of final approval of the

> settlement agreement, and no appeal having been taken from the approval order, plaintiffs may file a motion according to the court's regular calendar procedures seeking an award for costs, including reasonable attorneys' fees.

There being no agreement between the parties within the stipulated 35-day period, plaintiffs now seek an award of $409,846.88 in attorneys' fees and $90,571.92 in costs. This court, having heard argument on this motion on September 15, 1980, and the matter having been submitted, hereby grants plaintiffs an award of $221,634.88 in attorneys' fees, including reimbursement for paralegals, and $83,918.51 in costs.

IT IS SO ORDERED.

DISCUSSION

Plaintiffs maintain that section XI of the settlement agreement, quoted above, established their *right* to attorneys' fees and costs, and that the only issue to be decided upon this motion is the *amount* to be awarded. In support of this argument, they point to the language of section XI providing that "the parties shall negotiate concerning the amount of the costs, including attorneys' fees." In response, defendant argues that plaintiffs' entitlement to attorneys' fees was never agreed upon and that, in fact, plaintiffs' attorneys repeatedly affirmed their desire not to negotiate fees or costs until the settlement agreement had been finalized.

It is our conclusion that a better reading of section XI of the settlement agreement supports plaintiffs' position that they are entitled to some amount of attorneys' fees.

The language of the agreement specifically states that the parties will negotiate "concerning the amount . . . to be awarded." Had Delta wished to reserve the issue of plaintiffs' entitlement to attorneys' fees until approval of the settlement agreement, it presumably would have been more explicit in the agreement. For example, language such as "the parties shall negotiate concerning the amount, *if any*, to be awarded" would have more clearly served the ends which Delta now seeks to advance. In our opinion, the language actually adopted by the parties is unambiguous and clearly indicates that plaintiffs are entitled under the settlement to an award of attorneys' fees and costs.

1. *The amount to be awarded.* In determining the appropriate fee to be awarded, the trial court must consider the factors enumerated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974) and adopted in full by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975). These factors are:

a. The time and labor involved;

b. The novelty and difficulty of the questions;

c. The skill requisite to perform the legal services properly;

d. The preclusion of other employment by the attorney due to the acceptance of the case;

e. The customary fee;

f. Whether the fee is fixed or contingent;

g. Time limitations imposed by the client or circumstances;

h. The amount involved and the results obtained;

i. The experience, reputation and ability of the attorneys;

j. The nature and length of the professional relationship with the client;

k. The "undesirability" of the case;

l. Awards in similar cases.

Johnson, supra at 717-719.

In applying these factors, the court normally first determines a reasonable hourly rate for the work performed, based on the customary fee charged by the attorney for similar work, the range of fees for similar work in the geographical area, and any special expertise that the attorney may possess. This amount is then multiplied by the number of hours reasonably spent in preparation of the case; the result of this calculation is referred to as the "lodestar." The lodestar may then be adjusted according to other *Johnson* factors. The most relevant for our purposes here are the contingent nature of the work performed, the complexity and novelty of the issues and the results obtained.

Turning to the question of the reasonable hourly rate, we note first that plaintiffs request a fee of $100.00 per hour for lead counsel Ms. Leavey and Mr. Magaro. In addition, they seek a $100.00 per hour figure for 7.5 hours of work performed by Mr. Stewart. For the remaining 201 hours of attorney time, they request $50.00 per hour.

We conclude that the $100.00 per hour figure requested for the service of Messrs. Magaro and Stewart and Ms. Leavey is excessive. First, we were apprised that the hourly billing rate of Ms. Leavey for Title VII work performed in 1976 and 1977 was $65.00. In 1978 and 1979, her rate was $70.00 per hour. Likewise, Mr. Magaro's current

billing rate is $65.00 per hour. And similarly, Mr. Stewart, a partner of Carroll, Burdick & McDonough, has charged between 75.00 and $90.00 per hour work performed between 1976 and 1980. Thus, the customary rate of these attorneys for similar services—perhaps the most crucial factor in determining the reasonable hourly rate—is significantly less than that requested by plaintiffs in this action. Plaintiffs request the increase to $100.00 per hour on the basis of the novelty and complexity of the issues, delayed time for payment and other factors which we will more properly consider in adjusting the lodestar.

This court therefore concludes that plaintiffs are entitled to compensation at the rate of $70.00 per hour for the service of Ms. Leavey, her normal billing rate during the years in which the bulk of the work for this litigation was performed, $65.00 per hour for the services of Mr. Magaro, his customary fee, and $80.00 per hour for the work of Mr. Stewart, a partner in Carroll, Burdick & McDonough. In addition, we believe that these rates are justified by the special experience of Mr. Magaro and Ms. Leavey with Title VII litigation. Ms. Leavey has been admitted to practice in California since January 1972. From 1973-1976, she was a trial attorney with the Equal Employment Opportunity Commission and participated in a great deal of litigation. Since 1976, she has been associated with Carroll, Burdick & McDonough and has specialized in Title VII, public sector, and pension law. Similarly, Mr. Magaro has substantial experience with Title VII litigation. From 1971-1973, he worked with the Pennsylvania Human Relations Commission and the EEOC exclusively in the area of employment discrimination. He has been in private

practice since 1973 and estimates that he spends 90% of his time representing plaintiffs in Title VII litigation. His list of litigation experience is likewise considerable. Mr. Stewart, a partner in his law firm for 10 years, has, of course, significant legal experience.

Thus, in light of both the customary fee charged by plaintiffs' lead counsel and their expertise in handling Title VII matters, we conclude that $65.00, $80.00 and $70.00 are reasonable hourly rates for Messrs. Magaro and Stewart and Ms. Leavey, respectively. Moreover, in view of the various declarations filed by both sides in connection with this motion, as well as fees awarded by this district in recent Title VII litigation, this court is convinced that these rates are well within the range of rates charged by attorneys in this area for Title VII litigation. *See Westerlund v. Fireman's Insurance Company,* C-75-1639 WAI (N.D. Cal. 1980); *Kell v. Coldwell Banker,* C-78-1026 RFP (N.D. Cal. 1980). Defendant does not challenge, and this court has no reason to doubt, the reasonableness of the $50.00 per hour figure requested for the service of Messrs. Handsher and Lipson. Accordingly, this court awards $50.00 per hour for their efforts in the preparation of this case.

2. *Reasonable number of hours.* Plaintiffs request compensation for 2771.75 hours of work by attorneys and 244.25 hours of paralegal work. Defendant, for the most part, does not dispute the validity or veracity of this request. They do raise some relatively small complaints regarding Mr. Magaro's and Ms. Leavey's methods of recording telephone conversations with merit some mention here.

We do not agree with defendant's contention that Ms. Leavey's method of recording telephone conversations is improper. In accordance with the standard practice of her law firm, Ms. Leavey records a minimum of 15 minutes for each phone conversation. Plaintiffs argue persuasively that this method is entirely reasonable, as it is accompanied by the practice of not recording very small calls or unsuccessful attempts at reaching a party. Moreover, Delta is unable to support its request for a reduction of 50% of Ms. Leavey's telephone time.

Regarding Mr. Magaro, Delta condones his practice of charging a six minute minimum per call, but challenges his hours on the basis that he has recorded only three out of hundreds of phone calls at six minutes. Defendant is unable to offer any evidence that the phone calls were shorter in duration than the time indicated by Mr. Magaro, and, more importantly, do not support their rather arbitrary request for a 50% reduction in this telephone time.

In light of the affidavits of plaintiffs' attorneys verifying this time, this court cannot, without more evidence, engage in speculation as to the length of plaintiffs' attorneys' phone conversations. We therefore do not adjust these hours.

In addition, defendant points to several discrepancies between Mr. Magaro's and Ms. Leavey's entries for the same endeavor. In large part, these differences are either trivial or can be explained by variation in individual preparation and travel time. Thus, we conclude that the 2771.75 attorney hours requested by plaintiffs are reason-

able and an accurate reflection of the time spent in preparation of this case.

3. *Adjustment.* We now come to a consideration of the appropriate multiplier, if any, to be applied to the "lodestar" figure. Plaintiffs request a factor of 1.5, or a 50 percent increase in the base figure. Delta concedes that a multiplier of 1.2 would accurately reflect the contingent nature of the lawsuit but argues that the modesty of the results achieved dictate a reduction in the award to 10 percent of the lodestar. We conclude that a multiplier of 1.2 is reasonable and appropriate in light of the circumstances of this particular case.

First, we note that here, as in virtually all Title VII litigation of this size, plaintiffs' attorneys were undoubtedly aware that full payment for their services was contingent upon the unforeseeable outcome of the litigation. Thus, plaintiffs, who successfully negotiated a settlement agreement on behalf of a class numbering 8700, should be compensated in a manner that reflects the contingent nature of the work. Accordingly, plaintiffs are entitled to some increase in the fee award.

Moreover, we agree with plaintiffs' contention that the issues presented in this litigation were of such novelty and complexity as to justify an increase in the award. During the course of the litigation, Delta interjected the defense that any disparities in promotional rates were attributable to a "lack of interest" on the part of class members, rather than to discrimination by Delta Airlines. In furtherance of this defense, Delta hired a statistician and survey expert to conduct a nationwide survey of incumbent class mem-

bers and of similarly situated male employees. This action introduced a number of complex problems into the litigation. Most notably, plaintiffs were required to analyze the large volume of defendant's computer data and to prepare their own statistical case in order to meet the "lack of interest" defense. This involved extensive consultation and preparation with computer experts as well as plaintiffs' counsels' own immersion into the esoteric and complex realm of statistics. Another novel issue injected into the litigation was the admissibility of defendant's survey of class members as proof of lack of interest.

We reject, however, plaintiffs' request for an increase of 50 percent from the base fee. We find that the results obtained, while significant, do not warrant such a dramatic adjustment of the base fee. The settlement agreement reached by the parties established a claims procedure for addressing class claims, instituted a decentralized complaint process within Delta to deal specifically with sex discrimination complaints, initiated changes in the description of those jobs which afford significant promotional opportunities, and set up a job posting system for the supervisory position in the reservations departments. Although we certainly do not characterize these achievements as negligible, we do find that the agreement is somewhat limited in view of the initial large scope of the lawsuit. Most significantly, plaintiffs were unable to obtain a provision for goals and timetables for the promotion of female employees. In addition, the class claims procedure does not provide a presumption of discrimination in favor of the claimant, nor does it establish a back-pay fund.

We thus conclude that a 1.2 multiplier is reasonable in light of the various factors discussed above. Computing the attorneys' fee award, then, we conclude that plaintiffs are entitled to 2771.75 hours in total attorney time, which, when multiplied by the appropriate hourly rate, totals $182,427.50. This figure multiplied by a contingency factor of 1.2 yields a total attorney fee award of $218,913.00.

4. *Paralegals.* Plaintiffs initially requested 244.25 hours for paralegal time. Delta pointed out a duplication of time recorded as paralegal time and as a cost. In response, plaintiffs have adjusted their mistake and now seek compensation for 217.75 hours of paralegal work. Delta does not further dispute the hours plaintiffs seek for paralegal services. We therefore conclude that 217.75 is a reasonable and accurate reflection of time spent by paralegals in the preparation of this case.

In addition, plaintiffs seek to apply the multiplier of 1.5 to the paralegal work as well. This is clearly improper. Paralegals, while performing vital functions in the conduct of litigation, are not themselves attorneys and are not faced with the same contingencies in accepting a particular case that attorneys are. Paralegals receive compensation regardless of the outcome of the lawsuit and are not so closely intertwined in the progress of the case as to justify application of the Johnson factors to increase the base fee. *See In re Equity Funding Corp. of American Securities*, 438 F. Supp. 1303 (C.D. Cal. 1977).

Plaintiffs request $25.00 per hour for the paralegal services based on the normal hourly billing rate of Carroll, Burdick & McDonough. Cases are split on whether paralegal time should be compensated at a reasonable hourly billing rate or whether the law firm should be reimbursed for the wages paid to paralegals. The First and Second Circuits appear to have taken the position that the rate of compensation for paralegal services should be based on the amount of wages paid to the paralegals. *See City of Detroit v. Grinnel Corp.*, 95 F.2d 448, 473 (2d Cir. 1974); *Lamphere v. Brown University*, 21 FEP Cases 824 (1st Cir. 1979). Other district courts have adopted the rule that plaintiffs are entitled to compensation at the regular hourly billing rate. *See In re Equity Funding Corp. of America*, 438 F. Supp. 1303, 1330 (C.D. Cal. 1977); *CommonWealth v. O'Neill*, 31 F. Supp. 700 (E.D. Pa. 1977).

This court is persuaded by the view adopted by the First and Second Circuits that parties are entitled to reimbursement for the wages paid the paralegals by the law firm which employed them. Plaintiffs inform us that the hourly cost of the paralegals during the years 1978-1980 including salary, benefits, and their share of basic overhead operating expenses was between $13.42 and $14.10. They do not break this amount down to reflect the actual wages paid to the paralegals. This court concludes that $12.50 per hour represents a reasonable wage in light of the cost to

the law firm of these services. Plaintiffs will therefore receive $3,715.63 as reimbursement for paralegal services.

5. *Costs.* Plaintiffs seek the following costs:

1. Deposition Reporters & Transcripts	$ 9,838.51
2. Photocopying	4,696.38
3. Messenger Service/Process Service	559.53
4. Postage/Supplies	560.28
5. Special Secretarial Services	708.73
6. Travel, Hotel, Witness & Mileage	6,653.41
7. Telephone	767.69
8. Computer & Consulting Costs for Public Sector	6,674.89
9. Computer Costs Incurred by Kendall Associates	18,030.64
10. Professional Services—Kendall Associates	34,959.77
11. Other Computer Costs:	
a. Purchase of Tape & Cards	3,900.00
b. Hoffman Tape	390.00
12. Other Consulting Services	2,718.45
TOTAL	$90,458.28

Breakdown of Plaintiffs' Costs for Gerald Magaro Not Advanced by Carroll, Burdick & McDonough

1. Process Service/Filing	$ 18.60
2. Photocopying	17.70
3. Telephone	77.34
TOTAL	$113.64

Defendant objects to the vast majority of these, asserting that they are outside the scope of Title 28 U.S.C. § 1920, which sets forth recoverable costs in civil actions. That statute provides as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

In addition, defendant correctly states the general principle that while great discretion exists in the trial court to tax as costs those items enumerated in the section, such discretion should be "sparingly exercised." Defendant objects specifically to the taxing of items 2, 4, 5, 6, 7, 8, 9, 10 and 12 as costs. We will consider each of these in turn.

(a) *Item 2—photocopying expenses.* Defendant charges that plaintiffs' attorneys indiscriminately copied documents and hence should not recover under section 1920(4) which allows "fees for . . . copies of papers necessarily obtained for use in the case." Delta contends that since only a few of the photocopied documents were marked for use at trial, only 10 percent of the requested amount should be allowed.

We first note that the discovery in this case was extensive in scope and time. Because of the nationwide breadth of the lawsuit, plaintiffs' attorneys were required to gather documents in a variety of locations. Rather than stay in each location for a longer period of time (incurring expenses of other sorts), plaintiffs' attorneys found it

more expeditious to photocopy all relevant documents and decide later which were needed for trial. Thus, we reject defendant's assertion that plaintiffs "indiscriminately" photocopied masses of documents. We also reject the implication of defendant's argument that photocopy charges for only those papers marked for use at trial can be recovered as costs. The broad language of the section implies no such limitation, and we can find no compelling reason to impose one. Item 2 is therefore fully allowed.

(b) *Items 4, 5 and 7—postage/supplies, special secretarial services, and telephone.* Defendant objects to these items as overhead expenses which are normally included in attorneys' billing rates and are not chargeable separately as a cost. Plaintiffs contend that these costs reflect special services related to this particular litigation such as mailing costs for one mass mailing (not court ordered), extensive document review, and long distance telephone calls. These charges, plaintiffs assert, would normally be passed on to clients independently of the regular hourly billing rate.

Case authority in this area is less than ample. The general rule is that a party is not entitled to tax as costs those expenditures that are merely an incident to the preparation of the case. 6 Moore's Federal Practice ¶ 54.77 [8]. Moreover, these expenditures are not provided for in section 1920. While this court recognizes that plaintiffs are not necessarily entitled to recover every expense incurred in conducting litigation, we are also acutely aware of the complexity and increased expenses in bringing class action litigation of this scope. As stated above, we are informed by plaintiffs' counsel that none of the expenses listed in

these categories are normally included in the hourly billing rate; thus, defendant's argument that they represent overhead expenses and are therefore not recoverable is without merit. Moreover, defendant does not contend, and we do not find, that any of the expenses in these categories are frivolous.

On the basis of the equitable powers inherent in the trial court to fully compensate the injured plaintiff, this court concludes that plaintiffs are allowed to recover the expenses listed as items 4, 5 and 7. These expenses are not "merely incidental" to the preparation of litigation, but are directly related to the effective prosecution of this particular class action. In so ruling, we take special cognizance of the vital function which private class action lawsuits, such as the present one, perform for society and the strong policy in civil rights litigation to "make the injured plaintiff whole."

(c) *Item 6—travel, hotel, witness and mileage.* In her supplemental declaration, Ms. Leavey states that the greatest part of these items consisted of air fare, hotel and meal cost for attorneys in attending deposition and conducting document review around the nation. Plaintiffs do not break down this item to reveal the amount spent in taking depositions and the amount spent in conducting document review. Again, section 1920 does not specifically provide for plaintiffs to recover attorney travel expenses in connection with the litigation as a cost. Moreover, Appendix A(IV)(B) to the Local Rules of Court for this district specifically disallow expenses incurred by attorneys in taking depositions. Item 6 is therefore disallowed.

(d) *Items 8, 9, 10 and 12—computer costs and experts.* Defendant contends that plaintiff should not recover for expenses incurred in obtaining expert witnesses beyond the normal witness fees established in 28 U.S.C. § 1821 for mileage, per diem and subsistence. Although authority in this area is scant, the settled rule seems to allow court discretion to tax as costs above those enumerated in section 1821 if the litigants have sought court approval in advance. *Wahl v. Carrier Manufacturing Co., Inc.*, 511 F.2d 209 (7th Cir. 1975). Moreover, there is authority to allow greater witness fees if the court found the testimony of the witness to be particularly helpful. *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77 (N.D. Cal. 1978).

As there was neither advance court approval nor a trial in which the witness could have been helpful, defendant requests that the consulting expenses of public sector (item 8, Kendall Associates (item 10) and other consulting services (item 12) be disallowed. On a similar theory, defendant requests that the computer costs of item 9 be disallowed.

Plaintiffs argue that they should not be penalized for having settled out of court; that is, if the expert witness would have been helpful to the court during the trial and, hence, costs would have been recoverable in excess of the statutory rate, plaintiffs who settle before trial should be allowed to recover in excess of the statutory rate lest the Title VII policy of encouraging amicable settlements be undermined. Case authority which directly considers the problem of costs to be awarded upon settlement in Title VII actions is less than ample. In one case in which the court awarded costs for expert witness after settlement

in excess of the statutory rate, it did not specify the basis for awarding the fees. *See Women's Committee v. National Broadcasting Co.*, 76 F.R.D. 173, 183 (S.D.N.Y. 1977).

It is our belief that it would be a reasonable and proper exercise of discretion to apply the same standard in cases which settle that is applied in those that proceed to trial: the trial court may determine whether the expert witness or the evidence produced (as through the use of computers) would have been particularly helpful to the court had the action gone to trial. Moreover, the court may consider the role played by the potential testimony of the expert witness or the evidence in encouraging an out-of-court resolution.

In the present case, as in much of today's Title VII litigation, the alleged discriminatory practices were not overt or *de jure* but if proved, would consist of subtle company policies which result in disparate treatment of male and female employees. In order to prove their prima facie case, and, in particular, to rebut defendant's lack of interest defense, plaintiffs' statistical case as developed through the use of computer experts would have been essential. Had plaintiffs prevailed after trial, these costs would certainly have been recoverable. To force plaintiffs to trial in order to recover these costs would undoubtedly violate the Title VII policy favoring settlement. We therefore conclude that items 8, 9, 10 and 12 should be allowed in their entirety.

In addition, defendant's supplemental memorandum in opposition to this motion indicates some objection to item 1—deposition reporters and transcripts. The objection remains somewhat amorphous but is nevertheless without

merit. Plaintiffs inform us that the largest part of this expense was the cost of numerous depositions taken by the parties during the course of discovery. Local Rules of Court Appendix A(IV)(B) *specifically* provides that "[t]he cost of an original and one copy of any deposition used for any purpose in connection with the case is allowable." Our review of the receipts reveal that plaintiffs have included in this item the cost of an original and one copy of the depositions taken; hence, the local rule is dispositive. In addition, plaintiffs tell us that included in this item is the cost of a transcript from a hearing before a magistrate; this item is specifically allowed by section 1920(2) which provides that a judge may tax as costs the fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.

Defendants do not raise any specific objections to the costs advanced by Mr. Magaro. We conclude that these costs are allowable and that plaintiffs are entitled to recover $113.64 in addition to the amounts discussed above.

In conclusion, plaintiffs are entitled to reimbursement in the amount of $83,804.87 for items 1, 2, 3, 4, 5, 7, 8, 9, 10, 11 and 12 for the costs advanced by Carroll, Burdick & McDonough and $113.64 for costs advanced by Mr. Magaro.

Dated: December 5, 1980

/s/ ROBERT F. PECKHAM
Chief United States District Judge

Order of United States District Court for the Northern District of California amending attorneys fee award of December 5, 1980, to include additional fees for attorneys fee petition, March 13, 1981.

In the United States District Court
For the Northern District of California

No. C-76-0798 RFP

Margaret Thornberry, et al.,
Plaintiffs,

v.

Delta Air Lines, a corporation, et al.,
Defendants.

ORDER

[Filed March 13, 1981]

On December 5, 1980, this court issued an order granting plaintiffs $221,634.84 in attorneys' fees. We did not, at that time, provide for attorneys' fees incurred in making the motion for attorneys' fees. On January 19, 1981, plaintiffs moved this court to amend its earlier order to provide for such fees. Plaintiffs sought $19,322.00 as reimbursement for the time plaintiffs' attorneys expended in making the motion for fees. Having heard argument on the matter and having taken the motion under submission, this court hereby grants plaintiffs $2,700.00 in additional fees.

DISCUSSION

The prevailing rule in the Ninth Circuit is that attorneys' fees for making the motion for attorneys' fees may be awarded by the trial court. The policy reason underlying

such a rule is clear; were the prevailing party not entitled to recover fees incurred in making a motion for fees, the losing party would be encouraged to dilute the value of a fees award by forcing the prevailing parties' attorneys into extensive, uncompensated litigation in order to gain fees. Such an award is, of course, subject to the discretion of the trial judge. *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974).

In the present case, plaintiffs' attorneys seek compensation for 285.05 hours spent on the preparation of the motion for attorneys' fees. We find that the hours claimed are unduly excessive and reflect an unreasonable expenditure of time. While plaintiffs' attorneys did file extensive papers, as experienced Title VII attorneys, they are presumably conversant with the applicable case law for such a motion; legal research, therefore, should have been minimal. In effect, plaintiffs seek compensation for seven weeks of attorney time merely for the preparation of a motion for fees. Although we intimate no view on whether such an expenditure of time is ever reasonable, in the present case, we cannot justify awarding the amount requested.

We conclude that $2,700.00, compensation for 40 billable hours, is reasonable compensation for the time spent by plaintiffs' attorneys in making their motion for attorneys' fees.

SO ORDERED.

Dated: March 13, 1981

/s/ ROBERT F. PECKHAM
Chief United States District Judge

Judgment of the United States District Court for the Northern District of California approving settlement agreement and awarding attorneys fees and costs, April 1, 1981.

In the United States District Court
For the Northern District of California

No. C-76-798 RFP

Thornberry, et al.,
Plaintiffs,

vs.

Delta Airlines, a corporation,
Defendant.

JUDGMENT

[Filed April 1, 1981]

This is a class action suit complaining of sex discrimination by defendant Delta Airlines. Judgment in this action is hereby entered according to the settlement agreement approved by this Court on January 31, 1981. Further, this Court enters judgment in favor of plaintiffs in the amounts of $224,334.88 for attorneys' fees and $83,918.51 for costs incurred in the prosecution of this action.

So Ordered.

Date: April 1, 1981

/s/ ROBERT F. PECKHAM
Chief United States District Judge

Appendix C

Order of the United States District Court for the Northern District of California approving settlement of class action and dismissing action with prejudice, March 31, 1980.

In the United States District Court
For the Northern District of California

No. C-76-798 RFP

Margaret Thornberry, et al.
Plaintiffs,

-vs-

Delta Air Lines, a corporation, et al.,
Defendants.

[Filed Mar. 31, 1980]

ORDER FINALLY APPROVING SETTLEMENT OF CLASS ACTION AND DISMISSING ACTION WITH PREJUDICE

The matter of final approval of the settlement of this class action pursuant to Rule 23(e) of the Federal Rules of Civil Procedure came on for hearing on March 31, 1980. Based upon this hearing and the record in this action,

The Court Finds:

1. The notice given to the class and heretofore approved by the court was given in accordance with the court's order of December 14, 1979 and was the most effective and practical notice possible under the circumstances.

2. Despite a three month period for the filing of objections to the settlement, no class member has filed any objections to it, nor did any class member appear at the hearing to present such objections or argue against final approval of the settlement. The absence of any objections to the settlement after notice and opportunity to object is compelling evidence that the class is satisfied with the settlement's terms and provisions.

3. After reviewing the provisions of the settlement and analyzing those provisions in light of the record in this action, which includes the parties' proposed findings of fact and conclusions of law, trial briefs, trial exhibits, and summaries of proposed trial witnesses' testimony, the court finds that the settlement is fair, just and equitable to the class.

4. The tentative approval for the prosecution of this case as a class action under Rule 23(b)(2) on behalf of all former, current, and future female employees of Delta who worked at any time since February 9, 1973, in the Traffic and Sales/Marketing Departments of Delta's Marketing Division is hereby finally confirmed, all of the requirements of Rule 23(a) and 23(b)(2) having been satisfied.

Based upon these findings, it therefore is ORDERED, ADJUDGED AND DECREED that the proposed settlement agreement between the parties, dated December 12, 1979, be, and the same hereby is, finally approved and confirmed pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of the individual plaintiffs in this case and the claims of all other class members as defined in the settlement are hereby dismissed with prejudice.

DATED: March 31, 1980.

ROBERT F. PECKHAM
United States District Judge

SETTLEMENT AGREEMENT

I

INTRODUCTION

This Settlement Agreement is intended to resolve all issues remaining in the action *Thornberry, et. al. v. Delta Air Lines, Inc.*, C-76-798 RFP (N.D. Cal.). The parties to the agreement are the individual plaintiffs in the action, the class those individuals represent, and Delta Air Lines, Inc. (hereinafter "Delta").

The action which this settlement resolves was filed by plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). The Third Amended Complaint alleges that Delta has discriminated against plaintiffs and other female employees in its various personnel policies, including but not limited to its policies regarding hiring, job assignment, transfer, pay, promotion, evaluation, discipline, termination, and other terms and conditions of employment. Plaintiffs request various forms of relief, including declaratory relief that Delta's policies and practices violate the statutes involved, injunctive relief, back pay, costs, and attorneys' fees. Delta denies all of the material allegations of the complaint and alleges that its policies and practices are non-discriminatory, fair to all employees, and fully conform to all applicable federal laws.

On March 31, 1978, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the court certified the action as a Rule 23(b)(2) class action on behalf of all former, current, and future female employees of Delta

who worked at any time since February 9, 1973, in the Traffic and Sales/Marketing Departments of Delta's Marketing Division. Since this certification, the case has been maintained as a class action on behalf of those employees and former employees covered by the class definition. Consequently, the class which is covered and bound by this agreement includes all females employed by Delta at any time between February 9, 1973, and December 31, 1979, in the Traffic and Sales/Marketing Departments of the Marketing Division.

II

PURPOSES

The parties' purposes in settling the action are: (1) to insure continued equal opportunity for female employees of Delta; (2) to provide a mechanism for the presentation, investigation and resolution of individual claims of individual class members who believe that they have been discriminated against because of their sex; (3) to resolve all claims and questions of sex discrimination with respect to all class members; and (4) to avoid costly and lengthy litigation.

III

NON-ADMISSION

Delta denies each and every allegation contained in the Plaintiffs' complaint as amended regarding any violation of or failure to comply with Title VII or any other equal employment law, civil rights law, or other law, regulation or order. This Settlement Agreement does not constitute an admission or implication of any liability or wrongdoing on the part of Delta. By approving the Settlement Agreement, the court does not make any finding, expressly or

impliedly, of liability or wrongdoing. Neither this agreement nor anything contained herein shall be admissible in any judicial, administrative, or other proceedings as evidence of admission by Delta of any violation of or failure to comply with Title VII, any other equal employment law, administrative regulation, civil rights law or any other law, regulation or order.

IV

EFFECT OF SETTLEMENT

This settlement resolves all issues between the parties relating to any action, inaction, policies or practices alleged in or arising out of the complaint as amended and as limited by subsequent court orders, or within the scope of any charges filed by or on behalf of any of the named plaintiffs. The parties shall take no further action with respect to any complaint filed in the action except by way of enforcement of the terms of this Settlement Agreement. Upon final approval of the settlement, the claims of the plaintiffs and the class shall be dismissed with prejudice. Thereafter, any claims of sex discrimination by named plaintiffs or members of the class involving incidents or claims of discrimination which took place prior to December 31, 1979 shall be forever barred except to the extent that claims are filed pursuant to and in accordance with the procedures outlined below.

V

CLAIMS PROCEDURE

The parties agree that members of the class defined above will be given an opportunity to submit individual sex discrimination claims for consideration and possible

resolution. All claims of discrimination by class members shall be resolved by the claims procedure set forth below:

(a) *Scope of Permissible Claims.*

Members of the class as certified by the court may submit individual claims covering any alleged discrimination against them because of their sex within the scope of the allegations of the complaint with the following exceptions:

(i) Claims of hiring discrimination;

(ii) Claims of discriminatory termination;

(iii) Claims of promotion, job assignment, or salary discrimination in departments other than the Traffic and Sales/Marketing Departments of the Marketing Division, provided however, that claims by class members alleging denial of transfer opportunities to other departments are not excluded by this paragraph;

(iv) Claims of discrimination with regard to pregnancy, pregnancy related disability, maternity leave and other benefits policies; and

(v) Claims of discrimination in transfer to positions in the Marketing Department other than to the position of Marketing Representative Trainee.

No claims alleging discrimination based on race, national origin, religion, creed, color, age, handicap or any other types of discrimination will be recognized. Claimants may not advance any claims on behalf of any other class member, nor are class claims contemplated or permitted by this agreement. In order to be valid, the claims must be verified personally by the claimant.

There is no limitation on the number of class members who may file claims within the scope of permissible claims

as defined herein. However, where a conflict exists between more than one claimant for the same job opportunity, whether it be promotion, training, assignment, or any other job opportunity, the matter shall be resolved by the Magistrate if the claimants and Delta cannot agree among themselves. Under no circumstances shall any award, payment or relief of any kind be granted to more than one person for the same job opening or job opportunity.

(b) *Relief Available.*

Except as provided in subsection V(a) above, the claims procedure shall be open-ended and shall give to each individual claimant the opportunity to seek all relief to which she is entitled, including back pay, front pay, the right to the next available vacancy in any position that was unlawfully denied, and any other appropriate individualized affirmative relief. There shall be no award of interest or any adjustment of any award based upon an inflation factor. Appropriate state, local and federal taxes and other amounts customarily required to be withheld from wages by Delta shall be withheld from any amounts paid to or on behalf of the claimants.

In any instance where a claimant is granted a next available position, whether by reason of settlement or an award by the Magistrate, the right to the position and front pay shall be cut off by one offer of the position or a substantially similar position within the city in which the individual is employed at the time the award is made. Where no such opening occurs in the city in which the individual is located within six months of the date on which the relief is given, Delta may cut off the right to any position and

prospective relief by two offers of the position at issue or a substantially similar position in cities other than the one in which the claimant is employed.

The parties expressly agree that the authority of the Magistrate to award relief to the claimants shall be limited to granting the individual claimant such *individualized* relief as is contemplated by this agreement. The Magistrate shall not issue generalized findings or orders regarding the legality or illegality of Delta's employment policies and practices. Any order or award in violation of these limitations shall automatically be void and presumed to be without force or effect. The Magistrate's order shall only set forth the name of the party in whose favor he is ruling and the specific relief, if any, to be granted. No findings of fact or conclusions of law are required. The award of the Magistrate shall be final and binding and shall be appealable to the court only if it is in contravention of any term, condition or provision of this agreement. If the finding results in the payment of fees, costs, or expenses permitted by the terms of this agreement, the Magistrate shall hold a separate hearing to determine the appropriate Stage Three attorneys' fees, costs, and expenses, if any, to be awarded. The Magistrate's order with respect to this issue shall state the basis for his findings. In no instance shall the Magistrate's award be duplicative of any attorneys' fees, costs or expenses otherwise awarded to any counsel with respect to this litigation, including without limitation those payments provided for by Section V(d) hereof. Any award to personal counsel retained by a claimant shall be made in accordance with the provisions of this agreement and subject to its limitations, and in no event

shall exceed the amount that would be available to class counsel to process and prove a comparable claim.

(c) *Procedure.*

Following tentative approval of this agreement, the notice, claims instruction, and claims form attached hereto as Exhibits A, B and C and made a part hereof by reference will be mailed or distributed at Delta's expense by intra-company mail to currently employed class members, and by first class mail to formerly employed class members, inviting the class members to submit claims subject to the limitations previously outlined. These documents may be amended only by the court, and the continuing validity of this settlement shall be conditioned upon both parties agreeing to any such change.

A three-stage procedure shall be used for the filing and resolution of any claims filed by the class. All claimants shall have available to them representation by class counsel, without cost to any claimant, through the completion of Stage One of the claims procedure. The three-stage claims procedure is as follows:

(1) *Stage One:* Members of the class will have ninety days from the mailing of the notice and claims form to file a claim. All claims will be mailed to the court. Claims not bearing a postmark within 90 days of the mailing of the notice are *per se* invalid. After receipt of the claims, a reasonable period of time will be allowed for review of the claims and for counsel selected by claimant to review the salient facts with respect thereto. Within 30 days of final approval of this agreement, Delta shall (1) send to class counsel a list of all claims which appear to Delta to be

beyond the scope of the case or this settlement or to be otherwise frivolous; (2) send to class counsel a copy of the personnel files of the remaining claimants and a copy of Delta's employment file for any males named by said claimants in their claim forms as having received a position that was allegedly denied them on account of sex discrimination. Those claimants who choose to represent themselves or to be represented by private counsel will receive a copy of their own file. After receipt of all claims, Delta shall review each claim and make a written response to all of the claims which the parties are unable to agree are beyond the scope of the settlement or otherwise frivolous. The written response will be mailed to the claimant, with a copy to class counsel or any other counsel designated by the claimant. With respect to those claims which class counsel and Delta are able to agree are beyond the scope of the settlement or otherwise frivolous, the parties will jointly notify the claimant and any counsel designated by her of the disallowance of her claim and of her right to proceed through counsel of her choosing in accordance with the terms of his agreement. After Delta's initial response and/or offer to the remaining claimants, negotiations may continue between the parties, counsel for the parties, or either of them, for up to 90 days from the mailing of the response without any further discovery or other formal development of the claim. During this stage, the claimant shall have the opportunity to consult with her counsel, if any, as well as with class counsel, concerning Delta's settlement offer or statement of position and other aspects of her claim. If Delta's settlement offer or statement of position is not accepted within 90 days of its mailing, the claimant shall

within 30 days of the close of the 90-day period notify all counsel in writing of her rejection of the offer or statement of position and her intent to enter into Stage Two of the procedure. Failure to so act shall make Delta's offer or statement of position the final and binding disposition of the claim, any settlement amount to be payable upon execution and receipt of a full release. The claimant's rights and obligations in this respect shall be stated in Delta's settlement offer or statement of position.

(2) *Stage Two*: Stage Two shall begin when the claimant notifies counsel for Delta in writing of her rejection of the Stage One offer or statement of position and her intent to enter Stage Two. During this stage, the claimant and a Delta representative shall meet with the Magistrate in San Francisco, or in the case of former employee claimants in the judicial district in which the claimant resides, to discuss the claimant's claim and Delta's offer of settlement or statement of position. Counsel shall not participate in this meeting. Alternatively, any claimant may, at her option, present the facts in support of her claim to the Magistrate in San Francisco by letter, affidavit, telephone, or such other means as the Magistrate may decide is feasible and desirable. At this meeting, or based upon the parties' written presentations, the Magistrate will give the parties his impressions of the merits of the claim and its settlement value and will make a recommendation as to the disposition of the claim. This recommendation will be advisory only, and will not be binding on either party. Statements made by the parties during this meeting shall not be admissible in any subsequent hearings concerning the merits of the claim. After the meeting with the Magis-

trate, Delta will present to the claimant in writing its final Stage Two settlement offer or statement of position, which the claimant may accept or may reject by notifying Delta and class counsel in writing of her rejection and her desire to take her claim to a Stage Three hearing. A copy of Delta's final offer or statement of position shall be sent to any counsel designated by the claimant. Failure of the claimant to notify Delta and class counsel in writing of her election to enter Stage Three within thirty (30) days of the mailing of Delta's final Stage Two offer or statement of position will make Delta's final Stage Two offer or statement of position the final and binding disposition of the claim, any settlement amount to be paid upon execution and receipt of a full release. The claimant's obligation to respond in writing within 30 days shall be expressly stated in Delta's final offer or statement of position.

(3) *Stage Three:* If the claimant elects in writing to enter Stage Three of the claims procedure within 30 days of the mailing of Delta's final Stage Two offer or statement of position, the claim shall proceed to a hearing before a U.S. Magistrate in San Francisco upon either party asking for a hearing date. Prior to this hearing, counsel for claimant, or claimant herself, and Delta may undertake reasonable discovery and investigation of the claim, but neither Delta nor any claimant shall have any obligation to respond to substantially duplicative or burdensome discovery requests. All such discovery requests shall comply with the requirements of the Federal Rules of Civil Procedure. The period of discovery on the claims shall end no later than 150 days after the date of the

claimant's election to enter Stage Three proceedings. Any discovery disputes shall be heard by the Magistrate and will not be appealable. It is the intent of the parties that, upon request, a hearing before the Magistrate be set down at the earliest possible time and that the parties will work with the Magistrate to expedite any hearing date.

(d) *Costs and Expenses of Representation of Claimants.*

(1) Subject to the maximum payment limitations for the Stage One and Two proceedings set forth in subsection V(d)(2) below, with respect to all fees, costs and expenses of any kind or nature at any time incurred in connection with Stage One and Stage Two proceedings, class counsel will be compensated at the rate of $300.00 per class member who files a claim seeking relief from alleged discrimination by Delta, even if the claimant retains outside counsel. In light of this payment, any private counsel retained by a claimant shall not be compensated for time spent during Stages One and Two of the claims procedure. Under no circumstances shall Delta pay more than $300.00 per class member claimant during Stages One and Two.

(2) Notwithstanding any other provision hereof, there shall be an absolute limitation of $50,000.00 on the total amount of Delta's potential liability under the provisions of subsection (1) above.

(3) If the claimant prevails in the Stage Three proceedings before the Magistrate and receives an award in excess of Delta's final Stage Two settlement offer, Delta shall pay reasonable attorneys fees, costs and expenses awarded counsel for the claimant by the Magistrate. In making a determination of whether the claimant has prevailed in an

amount greater than Delta's offer to the claimant, the Magistrate's award to the claimant shall be compared against Delta's final Stage Two offer to the claimant without regard to any offer of attorneys fees or other payments to counsel by Delta or the granting of attorneys fees or other payments to counsel by the Magistrate. Without the consent of Delta and claimants, the Magistrate shall not be advised of the amount of Delta's final Stage Two offer of settlement, and such offers shall not be admissible in any proceeding other than a fee application.

(e) *Burden of Proof.*

The claimant's burden of proof during the claims procedure shall be that outlined by the Supreme Court in *McDonnell-Douglas v. Green* and its progeny or, in compensation cases, by the Equal Pay Act.* The parties agree that they shall not seek to admit nationwide statistical evidence, including the Hoffmann survey results, as to the makeup of Delta's workforce for purposes of ascertaining availability for promotion within the Marketing or Traffic Departments. Nevertheless, the parties' shall not be prohibited by this provision from admitting nationwide statistical data relating to or covering the bidding of jobs at Delta.

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*In other words, claims alleging discrimination in Delta's pay and compensation practices must show (1) that the claimant was paid less than male employees, (2) for performing work requiring equal skill, effort and responsibility; (3) under similar working conditions. Defenses to an equal pay claim are a showing that the pay differential was the result of (1) seniority; (2) merit; (3) a system which measures earnings by quantity or quality or production, or (4) any factor other than sex.

VI

JOB POSTING

(a) Delta will continue to post and bid Reservations Agent, Marketing Representative Trainee, and entry level Stations Department positions for the term of this agreement.

(b) In addition, Delta will post openings for the Assistant Supervisor and Supervisor positions in the Traffic Department. Initial posting will be limited to the location in which the opening exists. Thereafter, if the position is not filled by persons within the office having the opening, the position will be posted at the other domestic reservations offices in the Delta system. This posting system will remain in effect for the duration of the agreement.

(c) Positions exempted from the posting requirement shall be those filled by: (1) staff reductions; (2) reorganizations; (3) unit transfers and leveling; (4) hardship; (5) returns from leave of absence; and (6) demotions.

(d) Delta will add to the job description for the position of Customer Services Agent a description of the duties in all functional areas in the Stations Department for that position. Delta will place a telephone number on all CSA bids where information can be obtained concerning the functional area where the opening exists or may exist. It is expressly recognized by the parties that in most instances the functional area in which the opening exists or may exist will not be known until very late in the bid procedures. If a bidder is selected for a functional area which the bidder does not desire to accept, the bidder may

reject the offer without any effect on his or her subsequent job opportunities.

VII

DECENTRALIZED COMPLAINT PROCESS/ OMBUDSMAN

In order to facilitate the handling of employee complaints of sex discrimination, Delta will appoint one or more personnel staff members in the Atlanta office who will serve as liaisons for sex discrimination complaints from each local Marketing and Reservations office. Any complaints of employment discrimination may be brought to this individual. The staff member may take a statement from the claimant, investigate the matter and report to the Personnel Department in Atlanta with recommendations for actions to be taken. The complainant shall be assured of the confidentiality of the complaint unless the complainant requests an investigation of the charge. The investigator will be assured that he or she will not be adversely affected by the substance of any report or recommendation made as a result of the complaint. Training will be given to each such staff member as to the requirements of Title VII and other equal employment laws. The staff member will have available the resources and expertise of the EEO office of Delta in Atlanta. An explanation of this procedure shall be given to all members of the class and persons in the Traffic and Marketing Departments.

VIII

INDIVIDUAL CLAIMS

The claims of the individual plaintiffs will be compromised and released as follows:

1. Margaret Thornberry ...	$10,000 for back pay
2. Linda Magel	$ 5,000 for back pay
3. Dolores O'Sullivan	$ 5,000 for back pay
4. Patricia Farmer	$ 5,000 for back pay plus Delta's agreement to place in her file 13 complimentary letters from her former customers

Said plaintiffs shall not participate in the claims procedure described herein.

IX

MONITORING

The company shall submit to plaintiffs' counsel annually beginning one year after final approval of the Settlement Agreement for a period of three (3) years reports listing the number of openings for the positions of Assistant Supervisor, Supervisor, Customer Services Agent, and Marketing Representative Trainee, and the sex of persons selected for those positions during the reporting year. The report should be filed within 90 days of the end of each annual period.

X

TERM

This agreement shall remain in effect for a period of three (3) years beginning with date of its final approval. The court will have continuing jurisdiction to enforce the provisions of the agreement while it is in effect, but may not alter, amend, or add to its provisions and requirements by inserting provisions for quotas, goals and timetables,

alterations in company policies, or other affirmative relief not specifically provided for in the agreement. If the court or the Magistrate *sua sponte* orders, or plaintiffs, class members or any subsequent intervenor successfully applies to the court for, any affirmative relief not specifically provided for in this agreement, Delta may at such time withdraw from the agreement, which shall then be without force and effect and unenforceable against Delta. Upon final approval of the agreement, the Third Amended Complaint shall be dismissed with prejudice.

XI

ATTORNEYS FEES AND COSTS

After final approval of this agreement, the parties shall negotiate concerning on the amount of the costs, including attorneys' fees, to be awarded, subject to court approval. Should the parties fail to agree on this issue within thirty-five (35) days of final approval of the Settlement Agreement, and no appeal having been taken from the approval order, plaintiffs may file a motion according to the court's regular calendar procedures seeking an award of costs, including reasonable attorneys' fees.

Dated: December 12, 1979

Elizabeth G. Leavy
Carroll, Burdick & McDonough

By /s/ Elizabeth G. Leavy

Gerald E. Magaro

By /s/ Gerald E. Magaro

James W. Callison
Susan Q. Downer
Delta Air Lines, Inc.

By /s/ James W. Callison

Hunter R. Hughes, III
Rogers & Hardin

By /s/ Hunter R. Hughes, III

Edwin L. Currey, Jr.
Gilmore F. Diekmann, Jr.
Bronson, Bronson & McKinnon

By /s/ Gilmore F. Diekmann, Jr.

Attorneys for Defendant
Delta Air Lines, Inc.

Appendix D

Order of United States District Court for the Northern District of California dismissing maternity leave and other benefits claims, October 23, 1979.

In the United States District Court
For the Northern District of California

No. C-76-798 RFP

Margaret Thornberry, et al.
Plaintiffs,

-vs-

Delta Air Lines, a corporation, et al.,
Defendants.

ORDER

[Filed Oct. 23, 1979]

The issue of whether plaintiffs will be allowed to raise in this lawsuit claims involving Delta's maternity leave, survivors, and other benefits policies having come on for hearing on October 11, 1979, and the court having reviewed the briefs filed by the parties on the issue as well as the pleadings and records in this action, and having heard oral argument from counsel on the issue, and good cause appearing therefor,

IT IS ORDERED, that the maternity leave and other benefits claims raised by plaintiffs in the Third Amended Complaint be, and the same hereby are, dismisssed.

DATED: October 23, 1979

ROBERT F. PECKHAM
United States District Judge

Appendix E

Opinion and Order of United States District Court for the Northern District of California regarding class certification, March 31, 1978.

In the United States District Court
For the Northern District of California

No. C-76-798 RFP

Margaret Thornberry, Patricia Farmer,
on behalf of themselves and all
others similarly situated,
Plaintiffs,

v.

Delta Air Lines, a corporation,
Defendant.

OPINION AND ORDER

[Filed April 3, 1978]

This action is based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*[1] Plaintiffs include one current female employee and three former female employees of defendant Delta Air Lines ("Delta") who allege that they have been discriminated against in their employment with Delta on account of their sex.

[1]This action was also brought pursuant to the Equal Pay Act of 1963, 29 U.S.C. § 206(b)(1). In an order dated October 12, 1976, however, this court held that class actions could not be maintained under the Equal Pay Act pursuant to Rule 23 of the Federal Rules of Civil Procedure. The motion currently before the court therefore deals only with the Title VII allegations of the complaint.

In the motion now before the court, plaintiffs seek certification of a class which consists of the following:

> (a) all current and former female non-flight personnel, nationwide, who are engaged in Delta's marketing, sales, customer service and flight operations and
>
> (b) all females who have sought, but have been denied, positions in Delta's marketing, sales, customer service and flight operations.[2]

Delta is a Delaware corporation with headquarters in Atlanta, Georgia, engaged in the business of providing a full range of air passenger and air freight transportation and related services. In servicing its routes, Delta has personnel located in 102 cities, 46 states, the District of Columbia and 10 foreign countries, commonwealths or territories.

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[2]Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification at p. 3. In footnote 2 of their memorandum, plaintiffs state that "the proposed class consists of female employees and former employees in . . . [Delta's Operations, Operations-Passenger Service and Marketing] divisions, together with women who have unsuccessfully sought positions in these divisions." In plaintiffs' Reply to Defendant's Memorandum of Points and Authorities in opposition to Plaintiffs' Motion for Class Certification, plaintiffs further defined the class they sought to represent as follows:

> "(a) All former, current and future female employees working in non-flight jobs, nationwide, who were, are, or may be employed in Delta's marketing, sales, customer service and flight operations divisions;
>
> (b) All women, including both applicants and past and present female employees throughout Delta Air Lines, who have been or will be excluded from or denied jobs in Delta's marketing, sales, customer service and flight operations divisions by virtue of Delta's hiring, assignment, training, transfer and promotion policies and practices." (Reply at 2-3.)

Delta is divided into 6 divisions: General Counsel and Secretary ("Legal"), Personnel, Finance and Treasurer ("Finance"), Marketing, Operations and Operations-Passenger Service. Each of these divisions is further subdivided into several departments.

As of January 31, 1977, Delta had 28,926 full and part-time employees, 9,248 of whom were female. As of January 31, 1977, there were a total of 21,141 nonflight personnel assigned to Delta's Operations, Operations-Passenger and Marketing Divisions, 4,794 of whom were female.

Named Plaintiffs

Plaintiff Thornberry has been an employee of Delta since September 26, 1967, and has held the same job title, reservations sales agent, throughout her years of employment with Delta. She has worked at Delta facilities in Dallas, New Orleans and San Francisco, where she has been located since March, 1972.

Plaintiff Farmer was employed as a marketing representative agency specialist for Delta in San Francisco from January 1970 to October 1975. She began her employment with the title of sales representative trainee and was promoted to sales representative with agency sales responsibilities approximately six months thereafter. She maintained that job title throughout her employment with Delta.

Plaintiff O'Sullivan was employed by Delta as a reservations sales agent in New York City and Chicago between September 1967 and 1971, and again in San Francisco from April 1972 until July 30, 1975.

Plaintiff Magel was employed by Delta in San Francisco, Los Angeles and Miami as a reservations sales agent from April 1, 1966 continuously through December 17, 1975.

Discrimination cases, like all purported class actions, must satisfy the requirements established by Rule 23 of the Federal Rules of Civil Procedure:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

East Texas Motor Freight System Inc. v. Rodriguez, [14 EPD ¶ 7578] 52 L.Ed. 2d 453, 463 (1977).

Certification of a class under Rule 23 requires that plaintiffs satisfy the four requirements of 23(a) and qualify under one of the subsections of 23(b).

"(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) . . .; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) . . ."

Plaintiffs seek certification under 23(b)(2).

The Ninth Circuit recently addressed the issue of class certification in Title VII suits and concluded that "in determining whether an action alleging discriminatory employment practices shall be allowed to proceed as a class action, a trial court must consider the broad remedial purposes of Title VII and must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination." *Gay v. Waiter's & Dairy Lunchmen's Union*, 549 F.2d 1330, 1334 (9th Cir. 1977).

Typicality and Commonality—Existence of a Class

First of all, despite Delta's contentions to the contrary, plaintiffs adequately have demonstrated by statistical evidence the existence of a class of individuals with similar claims. Plaintiffs' statistical evidence indicates that female employees of Delta are concentrated in certain specific job classifications and have largely been absent from those jobs classified as official and managerial for EEO-1 reporting

purposes. In order for statistics to create the inference of discrimination, the plaintiff must establish significant disparity between the minority group's representation in the relevant labor market and the group's representation in the employer's workforce. *United States v. Ironworkers Local 86,* 443 F.2d 544, 551 (9th Cir. 1971), *cert. denied* 404 U.S. 984 (1971). Although Delta has offered evidence showing that its workforce compares favorably with the air transportation industry as a whole, the "relevant labor force" here does not consist of employees in the airline industry or of the United States labor force as a whole. Plaintiffs have shown that the overwhelming majority of the positions at Delta are filled through promotions, not through the hiring of outside applicants,[4] and therefore the relevant labor force consists of Delta's own employees. Plaintiffs have also shown a high concentration of females in entry level jobs. Plaintiffs' showing of a high concentration of females in entry level jobs together with a showing of a company policy of promotion from within and the absence of females in official and managerial positions is sufficient to meet the required showing of a class under Rule 23.

Section 1031.5 of the Standard Practice Manual sets forth Delta's promotion procedure:

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[4]Richard E. Ealey, Manager of Equal Employment, stated in his affidavit, attached to defendant's memorandum, that "Delta's records show that throughout the history of the company an overwhelming majoriy of openings have been filled by a transfer." Plaintiffs have also examined the personnel files of a number of Delta employees in supervisory and managerial positions and have found that all of these male employees began their employment at Delta in entry level jobs.

> Intradepartment promotions are the responsibility of the department head. Interdepartmental promotions are the responsibility of the department head and the Personnel Division. Promotions within Delta are based upon the individual's qualifications, job performance in present job, length of service, and recommendations of the employee's supervisor.
>
> In each instance, all available sources of information are investigated to ensure that every qualified employee is considered and the best qualified is selected. Information contained in the personnel file is reviewed, and recommendations are sought from local supervision. Consequently, the local supervisor and personnel records section should be informed of any outside activities (school courses, studies, participation in community affairs) which enhance your promotional qualifications.

Delta was asked in Interrogatory No. 6 of plaintiffs' first set of interrogatories to identify the individual or individuals at each facility charged with primary responsibility for general personnel policies, recruitment policies, training programs, equal employment policies, testing, manpower planning and utilization, transfer and promotion policies and employee welfare and benefits policies, and it responded as follows:

> The primary responsibility for the items listed in this interrogatory rests in the *Senior Vice President of Delta's Personnel Division* whose name, sex and business address is set forth in Exhibit D. Delta objects to the remainder of this interrogatory on the grounds that it calls for material not relevant to the subject matter of this action and not designed to lead to the discovery of admissible evidence. (Emphasis added.)

In addition, in Interrogatory No. 33 Delta was asked to describe documents describing local, regional and/or national policies and/or practices concerning criteria to be used in making determinations with respect to hire, promotion, transfer, layoff, evaluation, probation, discharge, and/or any other term and condition of employment. In its original response, Delta objected to the interrogatory and refused to answer it. Delta later offered to produce various sections of the Standard Practice Manual. Finally, Delta stated in footnote 2 on page 32 of its Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification that its "employee appraisal and performance review procedure utilizes a standard form and provides local managers with detailed instructions for its use. The form itself is very thorough and detailed and provides several different measures of performance with precise explanations of the points to be examined under each category."

Thus, although Delta has delegated employee appraisal and promotion recommendation authority to department heads, it appears that the design and implementation of Delta's personnel practices are centralized.

It is well established that employment practices which, although neutral on their face, have an adverse impact on protected classes, are illegal. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Rowe v. General Motors Corp.*, 457 F.2d 348, 354-55 (5th Cir. 1972). The name plaintiffs contend that Delta's promotional practices may have adversely affected all female employees and former employees at Delta and may account in large part for the

statistical patterns which have been described. The statistical data presented by plaintiffs in their moving papers raises an inference that Delta's allegedly facially neutral policies have a discriminatory impact upon women. Thus, plaintiffs have established that there is a class of individuals with claims similar to those alleged by the name plaintiffs. Although this conclusion goes mainly to the typicality of the name plaintiffs' claims, it also provides an adequate basis for a determination that there are questions of law or fact common to the class which are sufficient to satisfy section (a)(2) of Rule 23.

Breadth of the Class

We next must determine how broad of a class of female Delta employees should be certified. Under Rule 23, this question primarily involves the determination of the typicality of the name plaintiffs' claims as compared to the claims of the class which they seek to represent, and a determination of the adequacy of these plaintiffs' representation of the class. Fed. R. Civ. P. 23(a)(3), (a)(4). Because these requirements necessarily overlap to some extent, courts in the past have often considered them together. Nevertheless it is clear that the typicality requirement has meaning independent of the adequacy of representation. *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975); *Lim v. Citizens Savings & Loan Assoc.*, 430 F.Supp. 802 (N.D. Cal. 1977). One mode of analysis several courts have found helpful in analyzing typicality and adequacy of representation questions, particularly in cases such as this where the name plaintiffs seek to represent a very broad and diverse class, is to look to the degree to which there exists a factual nexus between the claims

of the representatives and the proposed class. *Wells v. Ramsey, Scarlett & Co.*, 506 F.2d 436, 437 (5th Cir. 1975); *Piva v. Xerox Corp.*, 70 F.R.D. 378, 387-88, 11 FEP Cases 1259, 1265-66 (N.D. Cal. 1975); *Knox v. Meat Cutters*, 11 FEP Cases 1327, 1329-30 (E.D. La. 1975). We rely on this mode of analysis to some extent because we have found it a useful way to conceptualize the questions of typicality and adequacy of representation now before us.

Factual Nexus—Nationwide Class

The name plaintiffs seek to represent a nationwide class of Delta employees. Nationwide classes have been found appropriate by several courts in cases where uniform practices were being attacked and there was common control of labor relations policy. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 252 (3rd Cir. 1975), *cert. denied* 421 U.S. 1011 (1975); *Piva v. Xerox Corp.*, 70 F.R.D. 378 (N.D. Cal. 1975) (class encompassing "Western Region," including 25 offices in 10 states). Delta contends that the name plaintiffs may not represent persons other than those in the San Francisco office because their claims are not typical of a broader class and they would not be adequate representatives. Delta argues that its offices vary enormously in size and scope from city to city, and asserts that the duties of employees with the same job title may be quite different in different cities.

We do not find Delta's arguments persuasive on this point. Although the organization of Delta's facilities may vary to some degree from city to city, it appears that the organization of the San Francisco facility is generally similar to the organization of Delta's other facilities. As

illustrated by section 1031.5 of Delta's Standard Practice Manual, Delta's answers to Interrogatories 6 and 33 of Plaintiff's First Set of Interrogatories, and the use of a standard form for employee appraisal and performance review, it appears that the design and implementation of Delta's personnel practices are centralized. Although Delta has delegated employee appraisal and promotion recommendation authority to department heads, we nevertheless can safely conclude from these exhibits and interrogatory answers that there is common control over Delta's labor policy. This common labor policy and the basic similarities in the organization of Delta's facilities indicate a sufficient factual nexus between the San Francisco facility and Delta's other facilities to satisfy Rule 23(a)'s typicality and adequacy of representation requirements.

Similarly, we do not find compelling Delta's other arguments that the name plaintiffs are inadequate representatives of employees outside of San Francisco because they are financially incapable of representing a nationwide class and because a nationwide class would be unmanageable. It appears at this time that much of the data concerning all of Delta's individual facilities is compiled by Delta on a regular basis in a series of computer generated corporate-wide reports which should greatly facilitate the conduct of this litigation and limit its expense. Should the plaintiffs encounter financial difficulty at some later stage, the court can take appropriate steps at that time. Likewise, the court reserves the right to reconsider the scope of the class should a nationwide class prove to be unmanageable at some later time. However, at this point we believe it is possible to certify a nationwide class.

Factual Nexus—Departments & Divisions within Class

In order to determine which departments and divisions of Delta should be included in the class, it is necessary to first set out the parties' respective positions as to which portions of the Delta organization may be included in the class, briefly explain something of the departmental structure of Delta, and outline the specific practices of Delta which the plaintiffs are attacking.

Delta contends that only employees in public-contact sales positions within the Sales/Marketing and Traffic Departments of the Marketing Division may be represented by the name plaintiffs. Plaintiffs' claims, according to Delta, are not typical of any broader class that would necessarily include employees with a wide diversity of job duties and responsibilities, involving significantly different personnel practices and promotion paths. The name plaintiffs, on the other hand, seek to represent a class including all nonflight females employed in the Marketing, Operations, and Operations-Passenger Service Divisions of Delta, as previously set forth.

The three divisions of Delta which plaintiffs seek to represent are comprised of a total of nineteen departments, five in the Marketing Division, ten in the Operations Division, and four in the Operations-Passenger Service Division.[5] Beginning with the Marketing Division, the name

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[5]Whereas Delta's Brief in Opposition to this Motion and the affidavit of Terry P. Schaede state that the Marketing Division is composed of five departments, the affidavit of Richard E. Ealey, also submitted by Delta, states that it comprises six departments. This same affidavit also alleges that the Operations-Passenger Service Division is comprised of five departments rather than the four men-

plaintiffs all worked in either the Traffic Department or the Sales/Marketing Department. The personnel of these two departments are not concentrated in Atlanta, Delta's headquarters, but rather they appear to be located in cities throughout Delta's system. There do not appear to be very many technical employees in these departments. Rather, the jobs in these departments can be categorized as administrative, management, and sales-type positions, a sizable proportion of which involve significant public contact.

The other three departments in the Marketing Division, Consumer Affairs, Marketing Planning, and Sales Promotion, are much smaller and have all of their personnel located in Atlanta. The Consumer Affairs Department is responsible for the handling of customer complaints and claims regarding cargo and baggage. Sales Promotion manages Delta's advertising program. The function of the Marketing Planning Department is unclear, but presumably it involves market research and attempting to anticipate market trends from which Delta might benefit. These

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tioned in several other places. Then again, the corporate organization chart submitted by Delta as Exhibit "A" shows *seven* departments within Marketing, and five within Operations-Passenger Service. Apparently there is some confusion as to whether certain groupings are considered departments or subdepartments. It does not appear to the court that this confusion will affect our determination of this motion, and for the purposes of this motion we will simply treat the Sales Promotion Department as encompassing the Advertising Department, and Consumer Affairs as including Customer Relations, all within the Marketing Division. Similarly, we will treat Passenger Service Planning as part of Passenger Service within the Operations-Passenger Service Division. We remind Delta, however, of its duty to inform the court of its actual corporate organization if we are laboring under a serious misunderstanding.

latter two departments mainly employ personnel with training and/or experience in specialized fields.

Delta's Operations Division is composed of ten departments: Communications, Engineering, Facilities, Flight Control, Flight Operations, Maintenance, Material Services, Operations Administration, Quality Control, and Technical Operations. The Flight Operations Department is primarily composed of Delta's pilots, and since the plaintiffs do not seek to represent Delta's flight personnel, the department is not involved in this action. Of the remaining nine departments, Delta's affidavits indicate that six—Flight Control, Facilities, Communications, Technical Operations, Engineering, and Quality Control—are primarily composed of technical personnel, such as engineers, communications specialists, and technical inspectors. Several of these departments are located entirely in Atlanta. The Maintenance Department, on the other hand, is system-wide, but again special mechanical skills are a requisite for most of its personnel. Delta has not informed the court as to the function of the Operations Administration Department, which is located entirely in Atlanta, but we infer from its title that its personnel are mainly administrative. Finally, there is the Material Services Department, which is responsible for ordering and warehousing supplies for the entire Delta system. It is comprised primarily of administrative personnel.

Delta's Operations-Passenger Service Division consists of the In-Flight Service, Passenger Service, Dining Service, and Stations Departments. The In-Flight Service Department primarily includes Delta's Flight Attendants, flight personnel uninvolved in this action. The Dining

Service Department is responsible for planning and managing the provision of food services on Delta flights. The actual preparation of meals is done by outside contractors acting on the instructions of the Dining Service Department, so we assume the personnel in the Department are mainly administrative. The Stations Department has personnel located systemwide, for it is this department which is responsible for most of the functions performed at the airport other than the repair of aircraft. Stations personnel load and unload baggage, and ballast and fuel the airplanes as well as clean them. It appears that most of the positions in this department involve a significant amount of physical labor. Finally, there is the Passenger Service Department. Unfortunately, Delta's exhibits do not contain any information as to the function of this department, and the plaintiffs have not discussed it either. It remains unknown to us.

The plaintiffs' third amended complaint simply recites that Delta's recruitment, hiring, promotion and transfer policies discriminate by sex. In their briefs, however, the plaintiffs have more specifically described examples of the alleged practices of Delta that they consider discriminatory. For instance, the plaintiffs contend that Delta has created additional positions, which are prerequisites to further promotion, that effectively serve as a barrier to the promotion of women to the more significant managerial levels. The plaintiffs cite the positions of lead reservations agent and lead reservations agent trainee in the Traffic Department. Both positions were apparently instituted in the 1970's, and holding both positions is apparently more or less a prerequisite to promotion to what plaintiffs con-

sider the first really supervisorial position, that of Reservations Supervisor. Similarly, in the Sales/Marketing Department, the position of Administrative Assistant has recently been created as a prerequisite to the job of Marketing Manager. The plaintiffs contend that before 1970, when there were virtually no female Marketing Representatives, men in that position were regularly promoted directly to Marketing Manager.

Plaintiffs also contend that certain job titles offering better promotional opportunities are held almost exclusively by men, while jobs held primarily by women offer only very limited promotional possibilities. The only example specifically provided by the plaintiffs concerns the job titles of Customer Service Agent and Customer Service Support Agent. These entry-level positions are predominantly held by males, allegedly at a 20:1 ratio. Plaintiffs maintain that these positions are effectively viewed by Delta as prerequisites for promotion into the upper echelons of Delta's management. Women, according to the plaintiffs, are concentrated in the entry-level jobs in the Traffic Department, which positions are not viewed by Delta as preparation for managerial positions outside that department. Plaintiffs have submitted exhibit M as support for this contention. Exhibit M tends to indicate that persons with Customer Service Agent experience have been promoted into a whole host of managerial and supervisorial positions in several of Delta's departments and divisions. On the other hand, Exhibit M also indicates that transfers from the reservations positions in the Traffic Department to the Customer Service Agent position are few, especially for females.

Another specific discriminatory practice assailed by the plaintiffs relates to the training opportunities for women within the Traffic Department. Allegedly, even within the predominantly female position of Reservations Agent, women are relatively excluded from the assignments which Delta considers as a prerequisite for promotion out of that position.

Another specific practice which the plaintiffs attack is the fact that promotions are largely within the discretion of the department heads, who are mostly male, even though standards for promotion are set by Delta's Standard Practice Manual. Similarly, the plaintiffs attack, as discriminatory devices, such Delta policies as its employees not needing to inform the company of their promotional ambitions, the failure to post notices of vacancies for most managerial and supervisorial positions, and the lack of an affirmative action plan, other than that resulting from a Consent Decree in another Title VII case.

We are now in a position to determine whether there is a sufficient factual nexus between the name plaintiffs and the class they wish to represent. *Wells v. Ramsey, Scarlett & Co., supra.*

As previously set out, the name plaintiffs all worked in the Sales/Marketing and Traffic Departments of the Marketing Division. The jobs in these two departments are sales, administrative, and management-type positions, and a substantial percentage of them involve extensive contact with members of the public. These name plaintiffs seek to represent female employees in all of the departments whose functions have been outlined above. These depart-

ments include personnel with such diverse job titles as mechanic, cargo handler, janitor, technical inspector, communications technician, and civil engineer. Clearly many, if not most, of the jobs in these departments require the employee holding the job to possess specialized technical or mechanical skills. Other jobs almost entirely consist of manual labor. Virtually none of the jobs in these other departments involve any significant contact with the public. In addition, several of the departments the name plaintiffs wish to represent are entirely located in Atlanta.

We do not think the name plaintiffs have much in common with the personnel in these other departments. Among the technically skilled and mechanically skilled positions, promotional paths and opportunities are likely to be entirely different from those jobs where such skills are not required. Hiring and promotional considerations are likely to be significantly different; the training and educational background of technical personnel likely will be much more heavily weighted than for nontechnical personnel. In addition, employees in centralized departments located entirely in Atlanta will have different promotional opportunities than employees in departments, such as those where the name plaintiffs worked, that staff facilities throughout Delta's system. A department with personnel located in many different cities, especially where there is a high incidence of inter-city transfers, will almost certainly offer significantly more promotional opportunities than a department which is entirely centralized at one location. In short, we do not think that the name plaintiffs have shown a sufficient factual nexus between the departments in which they worked and other departments in the

Delta organization. Nor do we think that the sex discrimination claims of these name plaintiffs have a factual nexus with the sex discrimination claims, if any, which employees in other departments might assert.

This absence of a factual nexus is further demonstrated by the specific examples of Delta's allegedly discriminatory policies set out above. Almost all of the examples of the specific allegedly discriminatory practices mentioned by the plaintiffs in their briefs involve only the departments in which the name plaintiffs worked. To some extent this is to be expected, of course, because of their greater familiarity with the situation in these departments. Also, this is indicative that the allegedly discriminatory practices engaged in by Delta may be quite subtle and difficult to detect, such as the alleged assignment of women to the less important desks within the Traffic Department, assignments which allegedly do not lead to promotion. But by the same token, this indicates to us that it is highly doubtful whether the plaintiffs would be able to discover similarly subtle discriminatory practices which may or may not exist in other departments and bring them into this litigation.

We, of course, recognize that the name plaintiffs need not have been adversely affected by each and every particular employment practice challenged, and thus may raise claims on behalf of the class which have not specifically affected them. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969); *Denison v. Department of Water & Power*, 10 FEP Cases 1486, 1489 (C.D. Cal. 1975). Nevertheless, we think it is highly relevant to the

determination of the adequacy of the name plaintiffs' representation of the proposed class and the typicality of their claims if the difficulty of their discovering the specific discriminatory practices which are potentially occurring in other departments is great, due to their unfamiliarity with these departments.

The name plaintiffs here clearly do not have more than a passing familiarity with Delta's other departments, their personnel, their promotional paths and opportunities, and their special problems. Nor do we see any way the plaintiffs could acquire such a familiarity, or the detailed information that would be required, during the course of this litigation. With regard to departments other than their own, the name plaintiffs of necessity would be basing their suit almost solely upon statistical data. While statistical data may be very significant in a Title VII case, and indeed may be sufficient in some circumstances to establish a prima facie case of unlawful discrimination, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied* 404 U.S. 984 (1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970), it is clear that this is an insufficient basis for allowing the name plaintiffs to represent these employees. To adequately represent the class requires more than just the ability to make out a prima facie case regarding the class, it requires the ability to fully and fairly litigate the claims of the class.

It is the duty of the court to carefully scrutinize the adequacy of representation in all class actions. *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). Our conclusion is that these name plaintiffs, due to their unfamiliarity with Delta's departments other than the Sales/Marketing and Traffic Departments, are unable

to adequately represent female employees in those other departments. *Cf. Hyatt v. United Aircraft Corp., Sikorsky Aircraft Division*, 50 F.R.D. 242, 245 (D. Conn. 1970). We further conclude that the claims of the name plaintiffs are not typical of the claims of employees outside of the Sales/Marketing and Traffic Departments. *See Gibson v. Local 40, Supercargoes & Checkers Union*, 543 F.2d 1259, 1264-65 (9th Cir. 1976).

Applicants

The name plaintiffs seek to include females who have sought but been denied positions with Delta in their proposed class. This portion of the proposed class was intended to include applicants to all of the departments and divisions whose current and former employees the name plaintiffs also sought to represent. Since we have just held that these name plaintiffs may not represent current and former employees other than those in the Traffic and Sales/Marketing Departments, we need deal here only with the name plaintiffs' ability to represent applicants to these two departments.

It has been generally held that identifiable applicants whose applications for employment were rejected may be part of the same class as present and former employees. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3rd Cir. 1975) (former female employees who had resigned and were not seeking reinstatement could represent class of past, present, and future female technical employees); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721, 723 (8th Cir. 1973), *cert. denied* 414 U.S. 854 (1973); *Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125, 130 (6th Cir. 1971); *Harriss v. Pan American World Air-*

ways, Inc., 74 F.R.D. 24, 40 (N.D. Cal. 1977). Of course, the court must always closely examine the proposed class to determine whether the claims of present and former employees may be antagonistic to the claims of applicants. If there are such conflicting interests, naturally the present and former employees would not be adequate representatives of a class including applicants. In the present case, however, we do not see any reasonable possibility that the interests of present and former employees may be antagonistic to those of applicants. Thus we would have no objections to the inclusion of applicants in the proposed class on adequacy of representation grounds.

Although prior cases have made it clear that applicants in some circumstances may be included in the same class with present and former employees, before we may include them here, the name plaintiffs must still allege facts showing that they fulfill the typicality requirement with respect to applicants. Conclusory assertions of sex discrimination in hiring in the plaintiffs' complaint are not sufficient. The plaintiff must at least allege specific facts tending to support a determination that the defendants have engaged in discrimination against a class including applicants. "Any inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class." *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975). To meet the typicality requirement the plaintiff must "demonstrate that other members of the class he purports to represent [actual, not hypothetical complainants] have suffered the same [or similar] grievances of which he complains." 524

F.2d at 269, *adding material in brackets & quoting White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971).

Neither the name plaintiffs' complaint nor the briefs and exhibits submitted for this motion allege sufficient facts to meet this test. The plaintiffs have done nothing more that allege hiring discrimination in conclusory fashion. Virtually the only specific allegation by plaintiffs relating to applicants is their contention that Delta has concentrated its entry-level female employees in certain job classifications while precluding women from other, more desirable, entry-level positions. However, the only jobs which they specify as historically excluding women, the positions of Customer Service Agent and Customer Service Support Agent, are not within the two departments remaining in the class. To what extent applicants have otherwise been mentioned at all in the plaintiffs' briefs and exhibits, the reference to applicants has not been limited to the Traffic and Sales/Marketing Departments. Thus the plaintiffs have not identified any particular hiring practices of Delta's Sales/Marketing or Traffic Departments which they consider discriminatory.

Because of this complete lack of specific facts regarding any alleged discriminatory hiring practices in these two departments of Delta, the inclusion at this time of past applicants within the plaintiff class would be unwarranted. We recognize, however, that neither the plaintiff nor Delta could have anticipated which departments or divisions the court would permit the name plaintiffs to represent in this action, and this may explain to a great extent the plaintiffs' failure to be more specific regarding the alleged discrimina-

tion in Delta's hiring practices regarding the two departments remaining in the class. Thus although we exclude past applicants for positions in the Traffic and Sales/Marketing Departments from the class at the present, in the interests of fairness this exclusion is to be without prejudice to the name plaintiffs' right to renew their motion, and to obtain, upon a satisfactory showing of typicality, the addition of applicants to the plaintiff class. However, any such motion is to be made within 60 days of this decision.

Adequacy of Plaintiffs' Counsel

The court's determination of the adequacy of the name plaintiffs to represent the class includes of necessity an evaluation of the competency of the plaintiffs' counsel to conduct the action. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 42-43 (N.D. Cal. 1977). While we have no doubt but that the plaintiffs' attorneys in this case are well qualified, experienced, and generally able to conduct the litigation, Delta has argued that the fee arrangement which plaintiffs' counsel has entered into with the name plaintiffs is unethical and thus reflects adversely upon their adequacy to serve as class counsel. Apparently the original fee arrangement with the plaintiffs did not provide that the plaintiffs would remain ultimately liable to repay the costs of litigation advanced by the plaintiffs' attorneys, but the plaintiffs state in their reply brief that new retainer agreements have been executed by the plaintiffs' counsel with each of the name plaintiffs. This satisfactorily meets Delta's previous objection to the adequacy of plaintiffs' counsel.

Cutoff Date

The name plaintiffs seek to include within the class all female employees who have been discriminated against since December 6, 1971. This date is two years prior to the filing of the first charge with the EEOC by one of the name plaintiffs, Margaret Thornberry, on December 6, 1973. The filing of a charge of unlawful employment discrimination with the EEOC within 300 days after the alleged unlawful practice occurred is a jurisdictional prerequisite to the filing of a Title VII action in this court. 42 U.S.C. § 2000e-5(e), (f)(1). In a class action, only the name plaintiff need satisfy this requirement, but the rule is seemingly well settled that only persons capable of meeting the requirement, that is persons employed on or after the 300th day prior to the filing of the charge, are eligible for class membership. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, (3rd Cir. 1975); *Harriss v. Pan American World Airways, Inc.*, 75 F.R.D. 24, 48 (N.D. Cal. 1977). Therefore, we hold that the plaintiff class is limited to persons employed by Delta on or after February 9, 1973, which is 300 days before December 9, 1973.

Persons Covered by Prior Settlement Agreement

In April of 1973, Delta entered into a settlement agreement with the United States, represented by the Office of Federal Contract Compliance of the Department of Labor and the Justice Department. *United States v. Delta Air Lines, Inc.*, Civil Action No. 18175 (N.D. Ga. 1973). This settlement agreement covers all female and minority employees hired prior to July 1, 1971, who were initially assigned to certain jobs, as well as female employees holding

specified jobs at the time of the settlement agreement in April, 1973. Because the agreement establishes specialized transfer and promotion procedures and grants specific transfer and promotion rights to the persons covered by the agreement, we do not see any way the name plaintiffs can satisfy the typicality and adequacy of representation requirements of Rule 23(a) with regard to these persons. Therefore, the plaintiff class will not include persons covered by the April, 1973, settlement agreement.

Numerosity

The name plaintiffs estimated that their proposed class included at least 1000 women. Of course, we have since narrowed the class significantly. It does not appear that either party has submitted any figures which would allow us to determine with any precision how many persons remain within the plaintiff class. However, in our estimation there are still far too many persons in the class to make their joinder in the action practicable. Delta states that there are 4,473 employees in the Marketing Division. It is apparent that the great majority of these employees are in the Traffic and Sales/Marketing Departments, since the other departments in the division are relatively small and centralized. The Traffic and Sales/Marketing Departments between them include almost all of the jobs within Delta which can be characterized as sales-type positions. According to Delta's EEO-1 reports for 1976, some 77.4% of the personnel classified as sales personnel were female. The number of women excluded by their inclusion in the April 1973 settlement agreement is uncertain, but does not appear to be great. Thus we conclude that, as limited by the court, the plaintiff class nevertheless continues to meet

the numerosity requirement of Rule 23. We reserve the right to reconsider this determination, however, should Delta be able to show that the number of persons actually included in the class raises a serious question regarding the numerosity requirement.

Limitation of Class Issues to Future Relief

Delta urges the court to limit any class certified in this action to issues of liability and injunctive relief. Rule 23(c)(4) provides for limitations to particular issues, and such a limitation is fairly commonly imposed when it appears that determining the amount of damages due the class members, assuming liability is found, will involve individual issues to such an extent that class treatment is inappropriate. *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 391, 396 (N.D. Cal. 1975). In this case, it is unclear to us at this point to what extent any eventual damage claims will involve individualized issues peculiar to each class member. It may well be that a determination of damages on a classwide basis in this action would be an administratively impossible task, but we are not in a position to predict at this time. Therefore, it appears most suitable at this point to follow the approach used by Judge Wollenberg of this district in *Harvey v. International Harvester Co.*, 56 F.R.D. 47, 48 (N.D. Cal. 1972), where a similar situation was presented. Thus, like Judge Wollenberg, we will certify the class as to all issues at this time, and after the claims for injunctive relief have been litigated we will reassess the suitability of class treatment of damage claims in light of the situation as it then appears. At that time we can either order damage claims to be tried in

separate actions or allow them to be filed and determined as part of this action.

Rule 23(b) Requirements

Although it has now been determined that this action meets the several requirements of Rule 23(a), it is also necessary for the action to qualify under one of the three subdivisions of Rule 23(b) in order to be maintained as a class action. Title VII class actions such as this one have been maintained for the most part under 23(b)(2). Rule 23(b)(2) treatment is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23 (b)(2). We find that this requirement has been met in this action.

CONCLUSION

It is our overall conclusion that the requirements of Rule 23(a) and 23(b) have been satisfied, and with the conditions and limitations discussed previously, this action may be maintained as a class action on behalf of a class consisting of all former, current, and future female employees of Delta who have worked since February 9, 1973, or are now working, in Delta's Traffic and Sales/Marketing Departments nationwide; excepting persons who are covered by the settlement agreement in *United States v. Delta Airlines, Inc.*, Civil Action No. 18175 (N.D. Ga. 1973). We stress, however, that although we hold that this action may be maintained as a class action, the scope and extent of the class herein certified is inherently tentative and sub-

ject to alteration as the litigation proceeds and the factual and legal issues involved become clearer. Fed. R. Civ. P. 23(c)(1). This general reservation is in addition to the specific reservations made with respect to manageability, numerosity, and inclusion of applicants in the class. As stated by Judge Schwarzer of this district in *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 37 (N.D. Cal. 1977), a class certification under Rule 23 "is essentially a procedural order. It carries no implication respecting the merits of the case. Nor does it determine that the class on whose behalf the action may be maintained will be the class which would recover relief should relief be granted."

A status conference regarding this action is to be held on Friday, May 5, 1978, at 3:30 p.m. At that time the parties should be prepared to discuss the future course of this litigation, including further anticipated pretrial motions and a tentative timetable for the expeditious prosecution of the action.

IT IS SO ORDERED.

Dated: March 31, 1978

/s/ ROBERT F. PECKHAM
United States District Judge

Appendix F

Memorandum and Order of United States District Court for the Northern District of California on motions to dismiss and to transfer venue, October 6, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-76-798 RFP

Margaret Thornberry, et al.,
Plaintiffs,

v.

Delta Air Lines, a corporation,
Defendant.

MEMORANDUM AND ORDER

[Filed Oct. 12, 1976]

Plaintiffs, one present employee and three former employees of defendant, bring this action on behalf of themselves and all other female nonflight personnel, former female nonflight personnel, and female applicants for nonflight employment at Delta Air Lines, pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), the Equal Pay Act of 1963 (29 U.S.C. § 206(b)(1)), and the California Fair Employment Practice Act (California Labor Code §§ 1401 *et seq.*) Plaintiffs allege a variety of unlawful employment practices, including discriminatory compensation, job classifications, recruiting, hiring, promotions, transfers, training, maternity leave and maternity leave benefits, fringe benefits, retaliatory action against women employees who opposed such practices, and failure to take action to eliminate present effects of past discrim-

ination. The prayer is for declaratory relief, back pay compensatory and punitive damages, and other relief.

Defendant has moved for an order pursuant to 28 U.S.C. § 1404(a) transferring this action to the United States District Court for the Northern District of Georgia, and for an order dismissing certain of plaintiffs' claims for failure to state a claim upon which relief may be granted and lack of subject matter jurisdiction. The court will address each motion in turn.

Motion to Transfer Venue

Defendant advances three main arguments for transfer: (1) the corporate headquarters in Atlanta is the only place where company-wide personnel records are maintained; (2) lead counsel and all principal witnesses with knowledge relevant to the class allegations are in Atlanta; and (3) plaintiffs' personal convenience will not be adversely affected by the transfer. Furthermore defendant maintains that there are two related actions pending in the Northern District of Georgia.

The party seeking a transfer under 28 U.S.C. § 1404(a) has the burden of establishing that the action should be transferred, and unless the balance strongly favors the movant plaintiff's choice of forum should not be disturbed. *Wm. A. Smith Contract Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972). Although venue is proper in this district under the special venue provisions of Title VII, 42 U.S.C. § 2000e-5(f)(3), that statute contemplates the availability of a transfer motion by stating "For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office

shall in all cases be considered a district in which the action might have been brought." However, the court is not satisfied that defendant has met its burden of establishing that transfer is warranted.

Plaintiffs contend that their own convenience and that of their counsel would in fact be adversely affected by transfer. Much of defendant's argument is based on the assumption that plaintiffs seek to maintain a nationwide class action while plaintiffs have not yet defined the scope of their proposed class. The witnesses and records relevant to plaintiffs' individual claims of discrimination are located in this district, and the court is therefore hesitant to transfer this action to Georgia before any class has been certified.

As to the two actions presently pending in the Northern District of Georgia, the court has reviewed the exhibits and notes that the settlement agreement entered in the first action essentially covers only those women working in clerical jobs who were hired prior to July 1, 1971. Moreover, the complaint filed by the Equal Opportunity Employment Commission in the second action, while seeking broad relief, specifically refers only to defendant's maternity leave and marriage policies. Thus, the instant action covers a broader class of female employees and a wider range of employment practices.

Accordingly, the balance does not tip in defendant's favor and the motion to transfer venue is denied.

Motion to Dismiss

Defendant first contends that plaintiffs cannot maintain a rule 23(b)(2) class action for violations of the Equal Pay

Act of 1963, section 216(b) of the Fair Labor Standards Act. While 29 U.S.C. § 216(b) permits an action to be brought on behalf of other employees similarly situated, it further provides that "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." The only three circuit courts to consider this question have held that rule 23(b)(2) cannot be invoked to circumvent the consent requirement of the Equal Pay Act. See *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535-536 (8th Cir. 1975); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975); *Sims v. Parke Davis & Co.*, 453 F.2d 1259 (6th Cir. 1971).

The *LaChapelle* court found a "fundamental, irreconcilable difference" between the rule 23 class action and that provided for by the Equal Pay Act, since the former action binds all class members who do not "opt out," while the latter action requires class members to "opt in" by filing written consent. Furthermore, the Advisory Committee notes to rule 23 state that the present provisions of 29 U.S.C. § 216(b) are not intended to be affected by rule 23. 39 F.R.D. 69, 104. Here no written consents have been filed, and plaintiffs' class action claims based on the Equal Pay Act must be dismissed.

Defendant next seeks dismissal of plaintiffs' prayer for treble damages, compensatory damages and punitive damages under the Equal Pay Act. The statutory remedy is the sole remedy available to employees for enforcement of rights under the Fair Labor Standards Act. *Lorwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027 (N.D. Cal.

1972). Plaintiffs now concede that 29 U.S.C. § 216(b) limits recovery to unpaid minimum wages plus an additional equal amount as liquidated or "double" damages. Plaintiffs are granted leave to amend the prayer accordingly.

Defendant also argues that plaintiffs fail to state a claim upon which compensatory or punitive damages may be awarded under Title VII of the Civil Rights Act of 1964, and the court must agree. Relief pursuant to 42 U.S.C. § 2000e-5(g) consists of injunctive relief and affirmative action including reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court deems appropriate.

In *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 835-836 (N.D. Cal. 1973), Judge Carter concluded that neither compensatory nor punitive damages may be awarded, based on the absence of such an intent in the legislative history, the fact that Title VII is modeled after the National Labor Relations Act which does not permit punitive damages, and the fact that Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c), expressly provides for a damages remedy. This reasoning was approved in *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975), holding that since back pay is a form of restitution rather than damages, a jury trial is not required in Title VII cases. Similarly, in *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975), the court held that there is no right to a jury trial in Title VII actions because back pay awards do not constitute legal damages.

While the Supreme Court has not directly passed upon this issue, in *Curtis v. Loether*, 415 U.S. 189, 197 (1974), the

Court noted that back pay in Title VII cases has been characterized as equitable restitution, which "contrasts sharply" with Title VIII's simple authorization of an action for actual and punitive damages. The court has found no persuasive authority for implying a right to compensatory and punitive damages in Title VII cases, and the motion to dismiss such claims herein is granted.

Regarding plaintiffs' pendent claims for violations of the California Fair Employment Practice Act, Labor Code §§ 1410 *et seq.*, defendant contends that this court lacks subject matter jurisdiction because administrative remedies have not been exhausted, and that plaintiffs fail to state a claim upon which relief may be granted because there is no private right of action to enforce the Act. The court believes that plaintiffs could easily amend the complaint to show exhaustion of administrative remedies, in that it appears that the Fair Employment Practice Commission waived jurisdiction in each of the named plaintiffs' case and returned the charges to the Equal Employment Opportunity Commission for formal filing. According to *Hollon v. Pierce*, 257 Cal.App.2d 468, 476 (1967), when an FEPC investigation comes to a complete halt, administrative remedies are exhausted.

However, a more serious question is whether plaintiffs can maintain a private action under the Fair Employment Practice Act. California Labor Code §§1410 *et seq.* do not expressly or impliedly provide a private action for injunctive or monetary relief. The statutory scheme creates the Fair Employment Practice Commission, sets forth its powers and duties, and defines unlawful employment practices. As discussed in Tobriner, "California's Fair Employ-

ment Practice Commission-the Frustration of Potential," 10 U.S.F. Law Review 37 (1975) and Comment, 'California's F.E.P.A. Remedies for Sex Discrimination—Are They Working?," 5 U.C.D. Law Review 483 (1972), an aggrieved individual may file a complaint with the Commission, which is empowered to conduct a full investigation, pursue conciliation, issue a show-cause order, conduct hearings, and grant cease and desist orders. Labor Code § 1428 provides that every final order or decision of the Commission is subject to judicial review in accordance with law.

However, the case cited by plaintiffs as implying a private right of action, *Hollon v. Pierce,* 257 Cal.App.2d 468 (1967), was an action for mandamus to compel reinstatement by a teacher who was allegedly discharged because of his religious beliefs. Nothing therein supports a private action for damages. Judicial review of an order or decision of the Commission may be had by filing a petition for a writ of mandate, Op.Leg. Counsel, 1959 S.J. 1272, and that is the only context in which private actions have been reported. See also *Marshall v. Fair Employment Practice Com.,* 21 Cal.App.3d 680 (1971).

In view of the fact that plaintiffs' charges sent to the Fair Employment Practice Commission were returned to the Equal Employment Opportunity Commission, which issued plaintiffs right-to-sue letters enabling suit under Title VII and the Equal Pay Act, plaintiffs have been afforded the proper judicial remedy. There being no authority for plaintiffs' claims under the California Act, they are dismissed.

Finally, defendant contends that plaintiffs lack standing to assert a class claim with respect to applicants for employment, because the named plaintiffs are not members of that class and have suffered no injury from the alleged discrimination against applicants. However, courts take a broad view of standing in Title VII litigation. See *Hadnott v. Laird*, 253 F.2d 304 (D.C. Cir. 1972); *Graniteville Co. v. EEOC*, 438 F.2d 32 (4th Cir. 1971); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970).

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), the Supreme Court quoted with approval an employment discrimination case, *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), wherein the Court concluded that the use in 42 U.S.C. § 2000e-5 of the language "a person claiming to be agrieved" showed an intention to define standing as broadly as is permitted by Article II of the Constitution.

In *Rich v. Martin Marietta Corporation*, 422 F.2d 333, 340 (10th Cir. 1975), the court cited a line of cases holding that even plaintiffs who have not suffered employment discrimination may represent a Title VII class. In *Dennison v. City of Los Angeles Dept. of Water & Power*, 10 EPD ¶ 10,356 (C.D. Cal. 1975) present and former employees were held to have standing to maintain a class composed of applicants, employees and retirees. See also *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975). This court holds that plaintiffs have standing to represent a class of employees, former employees, and applicants.

Accordingly, IT IS ORDERED that defendant's motion for a transfer of venue be, and the same is, hereby denied.

IT IS FURTHER ORDERED that plaintiffs' class action claims under the Equal Pay Act of 1963 be, and the same are, hereby dismissed for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that plaintiffs' prayer for treble damages, compensatory and punitive damages under the Equal Pay Act of 1963 be, and the same is, hereby dismissed and plaintiffs have 30 days from the filing date of this order in which to amend the prayer for relief under the Equal Pay Act.

IT IS FURTHER ORDERED that plaintiffs' prayer for compensatory and punitive damages under Title VII of the Civil Rights Act of 1964 be, and the same is, hereby dismissed for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that plaintiffs' pendent claims under the California Fair Employment Practice Act be, and the same are, hereby dismissed for failure to state a claim upon which relief may be granted.

It IS FURTHER ORDERED that plaintiffs' pendent claims under the California Fair Employment Practice Act be, and the same are, hereby dismissed for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss plaintiffs' class claims with respect to applicants for employment be, and the same is hereby denied.

Dated: October 6, 1976

/s/ ROBERT F. PECKHAM
United States District Judge

Appendix G

Excerpt from Petitioner's Opening Brief in the Ninth Circuit Court of Appeals. Statement of Facts, Section 2: "The Settlement Agreement Fails to Address Any of the Issues Involved in the Case."

• • • • •

2. The Settlement Agreement Fails to Address Any of the Issues Involved in the Case

Throughout the litigation, plaintiffs asserted an "across-the-board" attack on all of Delta's employment policies and practices and defined the scope of their suit as broadly as the court and existing legal theory allowed. Except for issues resolved in Delta's favor on the motion to dismiss and by the court's subsequent restrictions on the scope of the class, plaintiffs not only maintained all of their original allegations, but added new allegations as the case progressed. By the time of the pre-trial conference, their attack included challenges to Delta's entire hiring, job assignment, transfer, promotion, salary, employee evaluation, discipline, termination, and benefits systems. C.T. 4, 22, 29, 50, 262, 356, 357, 384, 388.

The best synopsis of plaintiffs' allegations and theories of liability is found in plaintiffs' March 15, 1979 answers to Delta's final contention interrogatories. C.T. 262. The contentions outlined in these responses came near the close of discovery and were carried forward by plaintiffs into their trial brief and proposed findings of fact and conclusions of law. C.T. 357; C.T. 384. The settlement agreement fails even to address, much less resolve, nearly all of these

questions. To the extent the issues are addressed, the "relief" afforded by the settlement was at best nominal. The issues involved in the lawsuit shortly before trial, and the extent to which they are addressed by the settlement, were as follows:

Plaintiffs' Contention	How Addressed by Settlement Agreement
1. Discouragement of Women seeking entry level positions in Stations and Marketing departments. (Int. 126a).[4]	Not addressed at all regarding Marketing Departments. In Stations, not addressed beyond minor alteration to bid notice description of CSA job duties. No changes in job requirements, job functions, selection procedures, or selection criteria. No recruitment, remedial, or affirmative action obligations. No goals and timetables.
2. Failure to give women the same opportunity for promotion as afforded to men. (Int. 126b).	Not addressed. No changes in standards, procedures, selection pools and selection criteria employed in promotion process. No goals and timetables, promotion preferences, or other affirmative relief.
3. Giving promotion authority to white male supervisors who use subjective selection criteria. (126c).	Not addressed. No changes in selection procedures or criteria.

[4]The Interrogatories referred to are the contention interrogatories answered by plaintiffs in C.T. 262, 277.

Plaintiffs' Contention	How Addressed by Settlement Agreement
4. Failure to post jobs above the entry level in the Sales/Marketing and Traffic Departments. (Int. 126d).	Not addressed with respect to Sales/Marketing Department; no changes effected. Not addressed with respect to Traffic Department beyond superfluous local posting (not bidding) of local supervisory positions; no changes in selection pool, selection procedures, and selection criteria.
5. Company philosophy that a woman's plac is in the home. (Int. 126d).	Not addressed. No changes in company policy or practice.
6. A written policy that it is not necessary to ask for a promotion. (Int. 126f).	Not addressed. Policy still exists.
7. Allegations that predominantly female jobs (Reservations Agent, Stewardess, Secretary) have fewest promotion opportunities and that those promotion opportunities that existed in these positions entailed minimal salary benefits. (Int. 126g).	Not addressed. No changes in salary or job progression systems.
8. Policies which impede and exclude women from airport (stations) jobs, such as requirement that persons interested in those positions be willing to work the ramp, gate and cargo functions. (Int. 126h).	Not addressed. No changes in requirements and selection criteria for persons seeking and bidding on stations jobs. No change in bid system or in job assignment policies.
9. Imposition of technical education requirements for "certain research jobs which tend to have disproportionately adverse effect on women." (Int. 126i).	Not addressed. No changes in prerequisites for any jobs or in selection criteria for any position.

Plaintiffs' Contention	How Addressed by Settlement Agreement
10. Imposition of personal appearance standards on female employees not imposed on male employees. (Int. 126j).	Not addressed. No change in personal appearance standards for either sex.
11. Discriminatory advertisements and other public representations that Stations jobs (ie., jobs at the airport) are men's jobs. (Int. 126k).	Not addressed. No changes in advertising or other public representations.
12. Preferences in promtions for persons who are willing to relocate. (Int. 126-l).	Not addressed. No changes in promotion criteria or preferences.
13. Discrimination against female employees who were pregnant or who had children through maternity leave policies, child care policies and policies regarding returns from maternity leave. (Int. 127a).	Not addressed. Subject of maternity leave and other benefits policies excluded from suit by court pursuant to Delta's motion at pre-trial conference.
14. Discrimination against married women and women with children in selection for promotion. (Int. 127b).	Not addressed. No changes in requirements and criteria for promotion or in promotion procedures.
15. Failure to create a "Senior agent" status in reservations similar to that for CSA's in the Stations Department. (Int. 127c, 131).	Not addressed. No changes in job structures in Traffic or Stations Departments, or in any other department.
16. Policy of paying Reservations Agents less than Stations Agents despite greater education requirements. (Int. 127d).	Not addressed. No changes in salary scales for either job.

Plaintiffs' Contention	How Addressed by Settlement Agreement
17. Policy of paying city ticket office agents (predominantly female) less than Senior Customer Service Agents at the airport despite allegedly equal work. (Int. 126e, 131).	Not addressed. No changes in salary scales or duties for either job.
18. Discriminatory testing procedures for Marketing Representative candidates which adversely affected females. (Int. 127f).	Not addressed. No changes in policies and practices of testing marketing representative candidates. No changes in tests.
19. Failure to promote clerical employees in the Sales/Marketing Department to Marketing Representative. (Int. 127g).	Not addressed. No changes in requirements or selection criteria, or in selection procedures, for marketing representative. No goals and timetables. No preferences for clerical employees in Sales/Marketing Department.
20. Requirement that an individual fill an Assistant Supervisor position before being promoted to Reservations Supervisor. (Int. 127h).	Not addressed. Policy remained unchanged.
21. Payment of females holding clerical positions in the Sales/Marketing Department less than Marketing Representatives even though they were doing the same work. (Int. 131).	Not addressed. No change in salary scales for either job category.
22. Policy of paying convention sales agents in the Traffic Department less than Marketing Representatives for the same work. (Int. 131).	Not addressed. No change in salary scales for either job category.

Plaintiffs' Contention	How Addressed by Settlement Agreement
23. Exclusion of women from most positions in the Stations Department. (Int. 134a).	Not addressed. No changes in selection procedures and criteria for stations jobs. No goals and timetables.
24. Policy of directing female applicants to Reservations jobs and male applicants to Stations jobs. (Int. 137).	Not addressed. No changes in recruitments or hiring procedures. No goals and timetables or other affirmative recruitment obligations.
25. Failure or refusal to promote or transfer women into sales positions at the same rate as men. (Int. 138).	Not addressed. No change in recruitment, promotion, or transfer policies for sales positions. No changes in selection procedures or criteria. No goals and timetables.
26. Exclusion or limitation of women in middle and upper management. (Int. 140).	Not addressed. No change in promotion policies and practices. No goals and timetables or other affirmative relief.
27. More rigorous application of standards relating to attitude, loyalty, support of company policy, and personal appearance to female employees. (Int. 148a, 150).	Not addressed. No change in company standards or means of applying them.
28. Imposition of physical fitness requirements on female CSA candidates which are not imposed on male candidates. (Int. 148a).	Not addressed. No change in requirements for CSA position or in selection procedures or criteria.
29. Alleged survivors' benefit policy which provided benefits to survivors of male employees that were not provided survivors of female employees. (Int. 152).	Not addressed. No change in survivors' benefit policy. Benefits issues excluded by court order pursuant to Delta's motion at pre-trial conference.
	C.T. 443, at 25-39; C.T. 444, at Ex. D; C.T. 445, at 5-8; C.T. 446.

Each of these theories was included in plaintiffs' pre-trial statement and trial pleadings and would have been litigated in detail had the case been tried. C.T. 356; C.T. 357; C.T. 371; C.T. 371-A; C.T. 384; C.T. 388; C.T. 389.

Each of the above issues also served as the basis for one or more items of relief demanded by plaintiffs during the settlement negotiations. C.T. 443, at 32-39; C.T. 444, at Ex. E1. As remedies for these practices, plaintiffs demanded 28 different categories of affirmative relief, including: a $6.6 million back pay fund; bidding of all jobs company-wide; division of the CSA position into separate job functions; abolition of cross-utilization of CSA's; development of professionally prepared job descriptions; development of objective selection and promotion standards for training programs and all positions in the Traffic, Sales/Marketing and Stations Departments; adoption of a variety of affirmative action efforts in hiring; abandonment of the company's personnel evaluation system and development of a new system by a "professional job analyst"; specific goals and timetables for positions in the Traffic, Sales/Marketing and Stations Departments; development of formal termination procedures; priority preference for class members seeking other positions; revision in the pay scales of a number of different job positions to equalize salary disparties; revision of the company's maternity leave policies; agreement to adopt a new OFCCP affirmative action plan; development of internal audit, monitoring, and EEO procedures; and widespread publicity efforts regarding the contents of the agreement. C.T. 444, at Ex. E1.

Nearly all of plaintiffs' claims and the relief they requested based upon these claims, were abandoned by plaintiffs during the settlement discussions. C.T. 443, at 32-39; C.T. 444, at Ex. E1-E10; C.T. 445, at 5. The settlement agreement executed by the parties and approved by the court bore little relation to the issues raised in the suit, afforded none of the relief demanded by plaintiffs below, wholly ignored most of the issues in the litigation, and afforded the class, at best, only nominal relief.

FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-192

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

DELTA AIRLINES, INC.,
Petitioner,

vs.

MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA NAGEL, on behalf of themselves and all others similiarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an award of attorney's fees made pursuant to a settlement for all time reasonably spent on a case brought under Title VII of the Civil Rights Act of 1964 properly reflects the extent to which plaintiff prevailed.

2. Whether expenses for experts and consultants, and other litigation costs not included as taxable costs under 28 U.S.C. § 1920 may be awarded as "costs" under Section 706(k) of Title VII of the Civil Rights Act of 1964.

PARTIES

The parties to the proceedings below were 1) the individual plaintiffs, Margaret Thornberry, Patricia Farmer, Dolores O'Sullivan, and Linda Magel; 2) a class of all women employed by Delta Air Lines, Inc. in its Marketing and Traffic Departments nationwide; and 3) defendant Delta Air Lines, Inc. The attorney's fee and costs award involved in this petition was made to plaintiffs' counsel Carroll, Burdick & McDonough and Gerald E. Magaro.

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No. 82-192

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1982

Delta Airlines, Inc.,
Petitioner,
vs.
Margaret Thornberry, Patricia Farmer,
Dolores O'Sullivan and Linda Magel,
on behalf of themselves and
all others similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on May 5, 1982, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as corrected and modified, is officially reported at 676 F.2d 1240. The court's May 13, 1982 opinion, and its orders of June 4, 1982, and July 14, 1982, modifying and amending the opinion, are included in the appendix of the petition as Appendix A, as is the Court of Appeals' order of June 17, 1982 denying Delta's petition for rehearing and suggestion for a rehearing en banc.

The opinion of the district court awarding attorney's fees and costs is not officially reported. It is unofficially reported at 25 EPD ¶ 31,496, and is attached as Appendix B to the petition.

Other opinions which may be relevant to the petition are attached as appendices to the petition. The order of the district court approving the parties' settle-

ment agreement in the underlying action and a copy of the settlement agreement are attached to the petition as Appendix C. The district court's opinion and order regarding class certification is unofficially reported at 16 EPD ¶ 8294 and is attached to the petition as Appendix E. The memorandum and order of the district court on petitioner's motion to dismiss and transfer venue is unofficially reported at 27 FEP Cases 1203 and 13 EPD ¶ 11,513 and is attached to the petition as Appendix F.

JURISDICTION

The jurisdiction of the district court originally was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), and under the Equal Pay Act of 1963, 29 U.S.C. § 216(b). However, in its class certification order, the district court dismissed claims

brought under the Equal Pay Act and jurisdiction was thereafter invoked only under Title VII. (See Petitioner's Appendix E at A-57, n.1)

Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The attorney's fee provisions of Title VII of the Civil Rights Act of 1964 are contained in § 706(k) of the Act, 42 U.S.C. § 2000e-5(k), which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The federal courts are authorized to tax costs under 28 U.S.C. § 1920 which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

This petition is taken from a decision of the Ninth Circuit Court of Appeals

upholding an attorney's fees award made to plaintiffs' counsel in a Title VII employment discrimination action. Plaintiffs represented a nationwide class of approximately 8,700 present and former female employees in the Marketing and Traffic Departments of Delta Airlines, the Petitioner.

On March 31, 1980, the District Court gave final approval to a Settlement Agreement which was reached after several months of negotiations. The Settlement included, inter alia, the following terms: a claims procedure to provide all 8,700 class members an opportunity to file claims for open-ended relief from any sex discrimination committed by Delta; a decentralized complaint process within Delta's employment structure to deal with any sex discrimination complaints of employees which might arise in the future; changes in the job description information

for the Customer Service Agent position to enhance transfer and promotional opportunities for female employees into airport positions; a job posting system to announce vacancies for supervisory positions in the Traffic (Reservations) Department; and a monetary settlement of the claims of the four named plaintiffs. The Agreement also provided for payment of plaintiffs' attorney's fees incurred in the handling of the claims filed pursuant to the claims procedure. (Pet. App. C) Since final approval, the parties have implemented the foregoing provisions of the Settlement Agreement.

As a term of the Settlement, the parties agreed to negotiate the amount of fees and costs to be awarded plaintiffs, and that failing agreement on the issue to allow the district court to determine the amount of attorney's fees and costs to be

awarded plaintiffs' counsel. 1/ (Pet. App. C at A-55) Having failed to reach agreement, Plaintiffs filed a motion seeking fees in the amount of $409,846.88 representing 2771.75 attorney hours and 244.25 hours for paralegal work, and reimbursement for costs incurred during the litigation in the amount of $90,571.92. Delta opposed plaintiffs' application for attorney's fees and costs on numerous grounds, contending among other things that plaintiffs should be denied fees because they failed to obtain every form of relief sought from alleged sex dis-

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1/ Section XI of the agreement provided as follows: "After final approval of this agreement, the parties shall negotiate concerning the amount of the costs, including attorneys' fees, to be awarded, subject to court approval. Should the parties fail to agree on this issue within thirty-five (35) days of final approval of the Settlement Agreement, and no appeal having been taken from the approval order, plaintiffs may file a motion according to the court's regular calendar procedures seeking an award of costs including reasonable attorneys' fees."

crimination in their suit. The parties extensively briefed the underlying and factual and legal issues concerning the appropriateness of the fee award. 2/

Following a hearing on the matter, the District Court entered judgment on December 5, 1980 awarding plaintiffs attorney's fees in the amount of $221,634.88 and costs in the amount of $83,918.51. 3/ While credit was given for all hours spent

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2/ The parties filed briefs totaling more than 200 pages regarding the fees and costs issue. Attached as Appendix A is an excerpt from one of Respondents' briefs filed in the District Court which addresses the issue of the extent to which plaintiffs prevailed. Plaintiffs address each of the criticisms made by Delta concerning their alleged failure to obtain certain forms of relief under the agreement. Not only did the settlement provide substantial relief, but the lawsuit had a "catalytic" effect of enhancing promotional and transfer opportunities for female employees. (See App. A) At the hearing of the motion for attorneys' fees, Delta conceded that the hours spent by co-counsel Leavy and Magaro were entirely reasonable and essentially nonduplicative.

3/ On March 21, 1981 the District Court granted plaintiffs $2,700.00 in additional fees incurred in bringing their motion for attorneys' fees.

by plaintiffs' counsel, the court reduced the hourly rates claimed from $100 per hour for Ms. Leavy and Mr. Magaro to $70 and $65 per hour, respectively. Due to the contingent nature of the case, the complexity of the issues, and because the results achieved were "significant," the court adjusted the lodestar upward by 20 percent. The court denied plaintiffs request for reimbursement of travel expenses totaling $6,653.41.

Delta did not, on the whole, dispute the reasonableness of the number of attorney hours or paralegal time spent on the litigation by plaintiffs, but argued essentially that plaintiffs should not be considered to be a prevailing party because the relief obtained under the Settlement Agreement was not substantial. Delta also contended that most of the costs for which plaintiffs sought reimbursement were not recoverable. Plain-

tiffs argued that the Settlement afforded substantial relief to the class and, further, that the lawsuit acted as a "catalyst" to bring about significant benefits to the class, including increased promotional opportunities, beyond the relief provided in the agreement. (See App. A)

After careful analysis and consideration of the evidence presented, the District Court found that the hours claimed by plaintiffs' attorneys were reasonable and that the class had been well represented by experienced counsel. The Court concluded that plaintiffs were "successful" in negotiating the Settlement, and that the results achieved by plaintiffs were "significant" and not "negligible" as Delta had argued. (Pet. App. B at A-22 to 24)

On appeal, the Ninth Circuit affirmed the District Court's award and found that

there was no evidence of abuse of discretion. Rather, the Court found that "the judge made a careful analysis of the appropriate award on attorney's fees." The Court held the fact that plaintiffs did not obtain every form of relief sought did not require a reduction in the amount to be awarded. It concluded that Plaintiffs were entitled to an award for all attorney time because it was spent in pursuit of their ultimate goal, to remedy the same injury, sex discrimination.

The Court further held that the District Court acted within its discretion in awarding out-of-pocket costs and expenses sought by plaintiffs. The Court found that the clearly expressed legislative purpose of Title VII could not be effectuated unless plaintiffs are allowed to recover their full costs of litigation. Moreover, the Court held it was proper for the District Court to award consulting and

expert witness fees to plaintiffs due to "special circumstances" which were demonstrated by the reasonable needs of the litigation.

Delta filed this petition for writ of certiorari following the Ninth Circuit's unanimous denial of its petition for rehearing and for a rehearing en banc. The order denying Delta's petition indicates that the full court of the Ninth Circuit had been advised of the suggestion for en banc rehearing and that no judge of the court requested a vote on the suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING AN AWARD OF ATTORNEY'S FEES TO PLAINTIFFS FOR ALL TIME REASONABLY SPENT WHEN PLAINTIFFS ESSENTIALLY SUCCEEDED ON THE CASE AS A WHOLE IS CONSISTENT WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS

The district court's broad discretion to determine reasonable attorney's fees has been well recognized in the circuit courts. E.g., Sangster v. United Air Lines, Inc., 663 F.2d 864 (9th Cir., 1980); Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980). In civil rights litigation, this Court has found that the amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). Thus, a prevailing plaintiff should ordinarily receive an attorney's fee unless "special circum-

stances" would render the award unjust. Id. at 402. The trial court must consider the Congressional objective of giving victims of discrimination access to the courts when determining an appropriate fee award. Moreover, the scope of review of the district court's exercise of discretion in awarding attorneys fees is narrow and will be upset on appeal only if there is a clear showing of abuse of discretion. Copeland v. Marshall, supra, 641 F.2d at 901; In Re Gypsum Antitrust Cases, 565 F.2d 1123, 1128 (9th Cir., 1977).

The attorney's fee provision of Title VII, 42 U.S.C. § 2000e-5(k), is to be construed liberally due to the vital importance of civil rights laws and the corresponding necessity of private enforcement. Bolton v. Murray Envelope Corp., 553 F.2d 881, 884 (5th Cir. 1977). The purpose of section 706(k) of Title VII is "to insure that attorneys will under-

take representation in this type of case." Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 447 (5th Cir.), cert. denied 419 U.S. 1033 (1974). The district courts must keep this Congressional objective in mind in calculating an appropriate award in each case.

A review of the Ninth Circuit's decision in the instant case shows that the Court applied the correct and appropriate legal standards for reviewing the District Court's award. Contrary to Petitioner's contention, the issue of the extent to which plaintiffs prevailed was indeed considered in its proper context. Petitioner's characterization of relevant decisions in other circuits, as well as those in the Ninth Circuit, is not only inaccurate, but is also misleading as applied to the facts of the instant case. A careful analysis of the cases demonstrates that the Court's decision is

consistent with decisions in other circuits and is well supported by the authorities.

In determining the amount of the fee award, the District Court followed the "lodestar" approach adopted in Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir., 1973), combined with the approach followed under Title VII in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir., 1974). Initially, the Court weighed a number of factors listed in Johnson to determine the legitimate hourly rate. The court then determined the reasonableness of the attorney time spent in the case. The Court multiplied the reasonable number of hours spent times the hourly rate to reach the lodestar figure. The Court then considered whether to adjust the lodestar upward or downward based upon the contingent nature of the

fee, the novelty and complexity of the litigation, and the results achieved. In making its analysis the Court considered Delta's contentions that plaintiffs did not prevail and failed to obtain any significant relief. The Court concluded that the results obtained were "significant" and not "negligible" as Delta had contended. (Pet. App. B at A-22, 23).

The circuit courts have consistently held that attorney's fees will be awarded for all time reasonably spent when plaintiff prevails on the underlying issue of the case. In Copeland v. Marshall, supra, 641 F.2d at 891-92 (D.C.Cir., 1980), the District of Columbia Circuit stated in dicta that no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail, but noted:

> However, it sometimes will be the case that a lawsuit will seek recovery under a variety of

> legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a Plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the 'issue was all part and parcel of one matter,' Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir., 1979), but only when the claims asserted 'are truly fractionable.'

Id., 641 F.2d 80 at 892, n. 18.

Subsequently, in National Ass'n. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir., 1982), the District of Columbia Circuit Court reiterated that time should be excluded "only when the claims asserted are truly fractionable." Id., 675 F.2d 1319 at n.13. The court also emphasized that contests over fees should not be permitted to evolve into exhaustive trial-type proceedings because "attorneys would be deterred from undertaking FOIA and Title VII actions if each victory on the

merits were inevitably but the prelude to an exhausting and uncertain battle over fees. This would frustrate the purposes of FOIA and Title VII." Id., 675 F.2d 1319, 1324. There is no dispute that all plaintiffs' claims for relief in the instant case are related to remedying essentially the same injury, sex discrimination, through a variety of legal theories. Thus, contrary to Petitioner's contention, the cases in the District of Columbia Court of Appeals support the conclusion that plaintiffs should be compensated for all time spent achieving their ultimate goal even though they were not successful on all theories.

Petitioner's reliance on Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir., 1978), as First Circuit authority is equally misplaced. Nadeau was a multiple claims prisoners' rights case in which plaintiff prevailed in only one of several claims

which were truly "fractionable." In Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir., 1979), the First Circuit specifically distinguished its holding in Nadeau in affirming an award of fees or all time spent in a Title VII employment discrimination class action case under circumstances which were virtually the same as those presented in the instant case. The Court affirmed an award of fees of $272,600.00 incurred in lengthy discovery, pretrial proceedings, trial preparation and settlement negotiations. Compensation was given for over 3,500 attorney hours expended in obtaining a settlement, including time spent by counsel in an unsuccessful attempt to broaden the scope of remedies available.

The Third Circuit, in Hughes v. Repko, 578 F.2d 483, 487 (3d Cir., 1978), followed a similar approach stating that "a prevailing party on a particular claim

is one who bearly can be found by the district court to have essentially succeeded . . . because in many cases a party may prevail on his basic claim but not on all aspects thereof." The Court of Appeals in that case reversed the district court's reduction of the lodestar fee by an arbitrary percentage, holding that it was legally impermissible to do so simply because Plaintiff had not prevailed on all claims. The Court stated: "[i]mplicit in our analysis is the recognition that legal services fairly devoted to successful claims are compensable even though those very same legal services also supported the prosecution of the unsuccessful claims." Id., 578 F.2d at 487.

Petitioner mistakenly contends that the Seventh Circuit has followed a different rule than the Ninth Circuit in the present case. In Dawson v. Pastrick, 600 F.2d 70 (7th Cir., 1979), the Court held

that an award of fees depends upon whether the Plaintiff prevailed in a practical sense and did not require success on every issue. Id. at 78. The court in Dawson specifically distinguished Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 187 (7th Cir., 1979) and other cases relied upon by Petitioner [4/] stating that Roesel involved an individual plaintiff while the Dawson case benefited a class. Other Seventh Circuit decisions have awarded full attorney's fees to plaintiffs who did not prevail on all issues. Coop v. City of South Bend, 635 F.2d 652 (7th Cir., 1980). (fee award is to be based on

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4/ The decisions in Muscare v. Quinn, 614 F.2d 577 (7th Cir., 1980) and Bushe v. Burkee, 649 F.2d 509 (7th Cir., 1981) relied upon by Petitioner involved situations in which an individual plaintiff failed to prove one or more substantive claims but prevailed on a procedural due process issue. Thus, the Plaintiff in those such cases did not prevail in a practical sense. "The circumstances of each case must be individually considered in determining who is the prevailing party." Dawson v. Pastrick, 600 F.2d at 79, n.13. (7th Cir., 1979)

a totality of the case in light of the purpose of the Act: "to permit and encourage plaintiffs to enforce their civil rights"); Murphy v. Kolovitz, 635 F.2d 662 (7th Cir., 1981) (plaintiff prevailed in a practical sense and is entitled to the award); Syvoc v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir., 1980) (plaintiff essentially succeeded in age discrimination claim, and reduction of attorneys fees for failure to succeed on damages issues was error). See, also, Sherkow v. Wisconsin, 630 F.2d 498 (7tn Cir. 1980)(plaintiff who prevailed on part but not all of her discrimination claim entitled to fees for all time reasonably spent).

The Tenth Circuit is also in accord with the approach followed by the Ninth Circuit. In Gurule v. Wilson, 635 F.2d 782, 791-92 (10th Cir. 1980), the Court held that it was inappropriate to reduce

an attorney's fee for every unsuccessful motion where the plaintiff prevails overall in the main issue in his case. And in Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981), the Court concluded that attorneys' fees may be awarded for work on "issues of fact or law upon which plaintiff ultimately did not prevail so long as they were reasonably calculated to promote the clients' interest." Id. at 733.

In the instant case the District Court found that plaintiffs "successfully negotiated a settlement agreement on behalf of a class of 8,700" and four named plaintiffs. 5/ (See Pet. App. B at A-22).

5/ The fact that plaintiffs prevailed through a settlement does not lessen their claim to fees. In Maher v. Gagne, 488 U.S. 122 (1980), this Court referred to the legislative history of the Attorneys Fees Act, 42 U.S.C. § 1988, and found that plaintiffs may prevail when they vindicate rights through a consent judgment or without formally obtaining relief:

> The fact that [plaintiff] prevailed through a settlement rather than

Although plaintiffs did not obtain every form of relief originally sought in their suit, they were successful in remedying the underlying claim of their case, sex discrimination, and in providing a mechanism for redressing future claims of discrimination. 6/ Under such circumstances the Ninth Circuit and all other

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5/ (continued)
through litigation does not weaken her claim to fees. Nothing in the language of section 1988 conditions the District Court's power to award fees on full litigation of the issues or in a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, p.5 (1976). Maher v. Gagne, 488 U.S. 122, 129 (1980).

6/ The agreement included open-ended relief for all class members from sex discrimination, a complaint process to deal with any sex discrimination complaints which might arise in the future, changes in job descriptions and enhancement of transfer and promotional opportunities for female employees.

circuits have held consistently that attorney's fees should be awarded for all time reasonably spent on the litigation by plaintiff's counsel. 7/ Manhart v. City of Los Angeles, 652 F.2d 904, 909 (9th

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7/ Contrary to Petitioner's contention, other Ninth Circuit decisions do not conflict with the ruling in the present case. In Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir., 1979), cert. denied, 444 U.S. 1046 (1981), the court of appeals stated in dicta that the amount of fees should be based on work performed on issues in which plaintiffs were successful, but specifically rejected the trial court's ruling denying fees because the plaintiff was only partially successful. Subsequently in Manhart v. City of Los Angeles, supra, the court upheld a fee award which included time spent in preparing claims dismissed by the district court. The court distinguished Sethy stating that: "no compensation may be paid for time spent to prepare unrelated claims in which plaintiff did not prevail." However, the court held that where, as here, "plaintiffs pursued several claims to remedy the same injury, gender discrimination," they "are entitled to an award for all time spent in pursuit of their ultimate goal." Manhart, supra, at 909. In Bartholomew v. Watson, 665 F.2d 910, 915 (9th Cir., 1982), the court suggested that the fees awarded may have been reasonable for services performed on successful issues even though plaintiffs did not entirely succeed. Due to uncertainty of the record the case was remanded for further findings by the district court. Thus, Sethy and Bartholomew can be reconciled with the holding in Manhart and the findings of the Court in the present case.

Cir., 1981); Seattle School District v. Washington, 633 F.2d 1338, 1349 (9th Cir., 1980); Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir., 1979), cert. denied, 447 U.S. 911 (1980); Bonnes v. Long, 599 F.2d 1316 (4th Cir., 1979); Watkins v. Scott Paper Co., 530 F.2d 1159, 1198 n.53 (5th Cir. 1976), cert. denied, 429 U.S. 861, 97 S.Ct. 63, 50 L.Ed. 2d 139 (1976); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir., 1981); Brown v. Bathke, 558 F.2d 634, 637-38 (8th Cir., 1978).

In an analogous situation, this Court has held that it was proper to allow fees to be awarded to plaintiff where a pendent constitutional claim is involved, even though the claim on which plaintiff prevails is one for which statutory fees are not authorized. Maher v. Gagne, 448 U.S. 122, 132, 65 L.Ed. 2d 653 (1980). The Court said:

> Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.
>
> Id., at 448 U.S. 132.

The foregoing demonstrates that the circumstances of each case must be considered on a case-by-case basis by the district judge in determining the amount of fees to be awarded to the prevailing party. The courts have held consistently that attorney's fees should be awarded for all time reasonably spent when plaintiff prevails on the case as a whole. Generally, only time spent pursuing "fractionable" or "unrelated" claims in multiple claims cases is noncompensible. The present case is a single issue sex dis-

crimination case, [8] and there is no dispute that any of the attorney hours claimed were spent pursuing unrelated or fractionable claims. Nor is their evidence that time was spent pursuing frivolous or bad faith claims.

Plaintiffs' counsel engaged in lengthy discovery and other pretrial proceedings and motions, trial preparation and settlement negotiations, occupying nearly 2,800 attorney hours in successfully achieving a settlement on behalf of a nationwide class and the named plaintiffs. Since plaintiffs succeeded on the case as a whole, the District Court exercised sound discretion in awarding fees for all time reasonably spent on the litigation.

8/ Apart from an individual cause of action for each of the four named plaintiffs, the complaint in the present case states only one cause of action, alleging that Delta committed unlawful sex discrimination against the class and named plaintiffs.

At no time during the litigation of the fee issue has Delta suggested how the court might dissect this case into issues or parts of issues and calculate hours spent on issues in which plaintiffs purportedly did not prevail. Indeed, such an approach is completely impracticable. Contrary to the interests of judicial efficiency and economy, it would result in endless litigation over minor discrepancies and interpretations of time records to determine whether time was spent on "prevailing" issues. The courts must "be mindful that in complex civil rights litigation . . . issues are overlapping and intertwined." Jones v. Diamond, 636 F.2d at 1382. As the Sixth Circuit stated in Northcross v. Board of Education, supra:

> There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into 'issues and parts of issues as to which the plaintiffs did

> not prevail,' especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated 'as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter.' We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.'
>
> 611 F.2d at 636.

The "lodestar" approach followed by the District Court in the present case provides a practical method for apportioning the fee according to the extent to which plaintiffs prevailed. First the court multiplies the number of hours reasonably spent on the successful litigation times the reasonable hourly rate to determine the lodestar figure. 9/ Then

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9/ Hours may be deducted for duplication, padding, or time spent on frivolous and bad faith claims. See, Northcross, supra at 636.

the court considers whether to adjust the lodestar upward or downward by applying a multiplier based upon a number of factors including the extent to which the plaintiff prevailed (results achieved). In this manner, the court is able to make a fair and just fee award without engaging in exhaustive trial-type proceedings thereby avoiding endless litigation over the number of hours spent on issues on which plaintiff prevailed.

In the present case after arriving at a lodestar figure, the Court considered whether to increase the figure by 50 percent as plaintiffs urged, or to follow Delta's suggestion to reduce it to 10 percent of the lodestar because of "the modesty of the result achieved." The Court concluded that "a multiplier of 1.2 [20 percent] was reasonable and appropriate in light of the circumstances of this particular case." (Pet. App. B. at A-22)

The Court's finding that the results were "significant" as well as its application of other factors to determine an appropriate multiplier (contingent nature of the fee; complexity of issues), is well supported by the record.

Finally, there is no merit to Petitioner's contention that the Court should grant certiorari in the present case because this Court granted certiorari on a similar question under 42 U.S.C. § 1988 in Hensley v. Eckerhart, No. 81-1244, ___ U.S. ___, 71 L.Ed. 2d 47, 50 U.S.L.W. 3695 (Mar. 1, 1982). The Hensley case can be distinguished from the instant case in several respects. Hensley is a multiple claims case involving the rights of mental patients in which plaintiffs lost on several significant claims after a trial on the merits. The present case was brought under Title VII to remedy essentially one injury, sex discrimination, and

plaintiffs successfully negotiated a settlement prior to trial which achieved their objective. Moreover, by adopting the "lodestar" approach to calculate the fee in the instant case, the District Court followed the method advanced by both parties for determining the fee. Thus, the Court did not reject the defendant's proposed methodology for calculating the fee as the court did in Hensley. Also, in Hensley, the appeals court did not issue a written opinion and summarily affirmed the lower court's fee award without analysis or reasoning of the issue raised. The Ninth Circuit in the present case made a careful review of the District Court's fee award, and wrote a well-reasoned published opinion which is supported amply by the record and by applicable case authority in other circuits. A further distinction is plaintiffs' contention made to the Ninth Circuit that under the terms of the Set-

tlement Agreement the attorney fee award of the District Court was final and non-appealable.

The issue presented in the instant case is more directly on point with the decision in Northcross v. Bd. of Educ., 611 F.2d 624 (6th Cir., 1979), cert. denied, 442 U.S. 911 (1980), relied upon by the Ninth Circuit in its opinion. Thornberry v. Delta Air Lines, Inc., 676 F.2d 1245, 1244 (9th Cir. 1982). In Northcross, the Sixth Circuit closely analyzed the legislative history of the Attorney's Fee Act which was intended to be construed in pari materia with section 706(k) of Title VII, and rejected the approach advanced by Petitioner in the present case. Concerning the calculation of the fee award, "Congress has mandated that a prevailing party's attorney should be compensated 'as is traditional with attorneys compensated by a fee-paying

client, for all time reasonably expended on a matter.'" 10/ Thus, denial of certiorari in the present case would be consistent with the Court's refusal to grant certiorari in Northcross.

Petitioner has failed to demonstrate any basis for a review of the decision of the Ninth Circuit in this case. The decision of the Ninth Circuit does not conflict with decisions in other circuits. The determination of an appropriate fee award is a matter of trial court discretion, and there is no evidence to show that the district judge abused his discretion in any way. The District Court properly considered the extent to which plaintiff prevailed along with other appropriate factors in calculating the fee award. As the Court of Appeals found,

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10/ Northcross v. Board of Educ., supra at 636; Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News p.5908.

"[i]f anything, the evidence is all on the other side, that the judge made a careful analysis of the appropriate award of attorneys' fees." Therefore, Petitioner's request for a writ of certiorari should be denied. 11/

II

THE COURT OF APPEALS' RULING THAT THE TRIAL JUDGE ACTED WITHIN HIS DISCRETION BY AWARDING OUT-OF-POCKET COSTS AND EXPENSES DOES NOT CONFLICT WITH 28 U.S.C. § 1920, DECISIONS OF THIS COURT, OR DECISIONS IN OTHER CIRCUITS

Petitioner contends, as it has in the lower courts, that the Court's award of

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11/ Respondents also oppose Petitioner's suggestion that the Court hold the present case in abeyance pending its decision in Hensley. Because the issue presented in Hensley is distinguishable, the disposition of that case is unlikely to affect the fee award in the present case. Plaintiffs' attorneys have yet to receive any compensation two and one-half years following the execution of the settlement, when plaintiffs question the very right to appeal the fee award in the first place. There is no evidence that the Court acted arbitrarily or abused its descretion in any way. It would be unjust and onerous to allow Delta to continue to benefit by using and investing fees which are rightfully due and owing plaintiffs.

certain "costs," including fees for consultants and experts, is in conflict with 28 U.S.C. § 1920 and the case law interpreting and applying that statute. However, section 1920 is complementary to Rule 54(d), F.R.Civ.P., which relates to taxation of costs, as a matter of course, to a successful litigant after trial on the merits. Clearly, plaintiffs' entitlement to costs stems from the statutory attorney's fee provisions of Title VII, 42 U.S.C. § 2000(e)-5(k), and the well established principle that plaintiffs who have obtained a benefit for a class through settlement are deemed to be prevailing parties for purposes of an award of fees and costs. 12/ Thus, an award of costs under Title VII is not limited by section 1920, and the cases cited by Petitioner have no application to the present case.

12/ See note 5, supra.

In holding that the trial court had discretionary authority to award certain cut-of-pocket costs and expenses sought by plaintiffs in their application for attorney's fees, the Ninth Circuit Court stated:

> Perhaps the most important justification for awarding costs like these is that the refusal to compensate such costs would make it difficult, if not impossible, to effectuate the purpose of Title VII, which has been characterized by the Supreme Court as follows: 'To make persons whole for injuries suffered on account of intentional employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers.' Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added).
>
> Needless to say, the clearly expressed legislative intent cannot be effectuated unless the court has the option to allow plaintiffs to recover the full costs of litigation.
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> Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1244-45 (9th Cir. 1982).

With respect to consulting and expert witness fees, the Court of Appeals indicated that the district court's discretion to award such expenses may be limited to situations in which there is a showing of "special circumstances." See, Chapman v. Telephone and Telegraph Company, 456 F. Supp. 77, 83-84 (N.D.Cal. 1978), and cases cited therein. In the instant case, there was evidence of special circumstances because the District Court found that the testimony of the expert computer witnesses was essential both to prove plaintiffs' prima facia case through the use of statistics and to rebut the defendant's "lack of interest" defense. Thus the Court concluded that the District Court's award of such fees was within its discretionary authority.

Petitioner concedes, as it must, that the Court's opinion is supported by decisions in the Fifth and Sixth Circuits.

See, Northcross v. Board of Education, 611 F.2d 624, 639 (6th Cir., 1979), cert. denied, 447 U.S. 911 (1980); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir., 1981). Petitioner has failed to cite any contrary decisions in civil rights cases. The Fifth Circuit in Jones v. Diamond, supra, held that plaintiffs were entitled to recover such costs explaining that:

> Congress has manifested an intention that a different rule be applied in civil rights litigation . . . counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, . . . expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover expert fees, plaintiffs, . . . will be unable to bring these cases.
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> 636 F.2d at 1382.

It is clear that the District Court had discretionary authority as mandated by Congress to make an attorney's fee award which included reimbursement for costs and

expenses not included under section 1920. The Court's decision does not conflict with section 1920 or with cases in other circuits allowing out-of-pocket costs and expenses in Title VII cases. Courts have frequently awarded expert witness fees and other costs and expenses not taxable under 28 U.S.C. § 1920 in employment discrimination cases. See, E.E.O.C. v. Datapoint, 421 F. Supp. 406, 410 (W.D.Texas 1976) aff'd in part and remanded in part on other issues, 570 F.2d 1264 (5th Cir. 1978); Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D.Texas 1974); Women's Committee v. National Broadcasting Company, 76 F.R.D. 173, 182 (S.D.N.Y. 1977); Commonwealth of Pennsylvania v. O'Neill, 431 F. Supp. 700, 713 (E.D.Penn. 1977). See also, E.E.O.C. v. Kenosa School District, 22 F.E.P. Cases 1367 (7th Cir., 1980). Indeed, to deny plaintiffs their substantial costs which were essential to

establish a prima facie case and rebut Delta's defense would virtually guarantee that no attorney, no matter how well motivated, could afford to "bring private actions to enforce civil rights laws," a result directly contrary to the expressed legislative intent of Title VII.

Finally, Petitioner's contention that the Court of Appeals' decision is in conflict with decisions of this Court in Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964), and Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975) is clearly incorrect. In Farmer, this Court court did not consider an award of costs and expenses under a statutory attorney's fee provision. As shown above, a different rule applies in civil rights litigation because Congress has expressed an intention to effectuate civil rights statutes by giving the courts full equitable powers.

Moreover, the Court's decision in Alyeska can be distinguished from the instant case on several grounds, including Petitioner's admission that the Court was considering only the question of attorney's fees as "costs." Section 706(k) of Title VII provides the courts with express statutory authority to award costs including reasonable attorney's fees. Furthermore, it is well known that this Court's decision in Alyeska led to the subsequent enactment of the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, which gives the federal courts express authority to grant an award of fees and costs to prevailing plaintiffs as part of the remedial purpose of civil rights statutes. There can be no question that the decision in Alyeska is no longer applicable in civil rights cases and that the Fees Act would dictate a different result were the issue to be decided today.

In sum, the decision of the Court does not conflict with applicable authority. On the contrary, the award of expenses and costs is entirely consistent with the Congressional intent of effectuating the purposes of Title VII. Therefore, the court should deny the petition for writ of certiorari.

CONCLUSION

There is no conflict among the circuits with respect to the legal principles and guidelines applied by the Ninth Circuit for a determination of an appropriate attorney's fee and cost award under the facts of the instant case. Therefore, Respondent prays that the Petition for A Writ of Certiorari to review the judgment

and opinion of the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

GERALD E. MAGARO
Attorney for Respondents

DATED: August 30, 1982.

(Appendices follow)

APPENDIX A

EXCERPT FROM RESPONDENTS' REPLY MEMORANDUM IN DISTRICT COURT TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

C. The Settlement Agreement Affords Substantial Relief to the Class.

Plaintiffs have, at pages 15-23 of their Opening Memorandum, outlined the scope of relief afforded to the class by the Settlement Agreement. Defendant, however, attempts to minimize these achievements by characterizing them as either redundant of practices already in effect at Delta or as providing no rights for the class other than those they would have enjoyed in the absence of the agreement. A cursory review of the provisions of the agreement, however, demonstrates the falsity of Defendant's contention.

1. The Claims Procedure.

As stated by Defendant, the heart of the settlement is a claims procedure which gives class members the right to present

individual claims for relief from unlawful discrimination. The claims procedure negotiated by Plaintiffs is extremely favorable to the class. Some of the more prominent features of the claims procedure are the following:

a. The claims procedure includes all class members, nationwide, and includes all job positions in the departments certified by the Court (Traffic and Marketing). Thus, all members of the class certified by the Court are included in the claims procedure.

b. The scope of the issues which claimants can raise through the claims procedure is broad, including all forms of employment discrimination based on sex, except refusal to hire, termination, and maternity leave issues. Refusal to hire was excluded because the Court did not include unsuccessful applicants in the class, and hiring thus was

not at issue. Termination issues are highly individualized and, as Defendant states in its brief, there is no data which would support a class-wide finding of liability in terminations. Thus, failure to have termination claims included in the procedure did not represent a significant loss to Plaintiffs. Maternity leave issues were excluded by Order of the Court shortly before the case was scheduled for trial, and thus were not included in the claims procedure. Thus, the settlement claims procedure that was negotiated by Plaintiffs is as broad in scope as that which would have been ordered by the Court for Stage II proceedings had Plaintiffs proceeded to trial and established class-wide liability at Stage I.

c. The procedure provides claimants with the opportunity to obtain all relief to which they are entitled,

including non-monetary relief such as job placement, i.e., transfer or promotion, as well as back-pay and "front-pay."

d. The amount of money which may be awared [sic] to each claimant as back-pay or front-pay is completely unlimited. Thus, the amount of monetary relief available to class members is totally open-ended.

e. The total number of class members who may file claims is unlimited. Any of more than 8,000 class members was given full opportunity to file a claim.

f. Claimants are provided with representation by class counsel, free of charge, during Stage I of the proceedings. Subsequent to Stage I, class counsel may continue to provide representation on a contingency basis. Furthermore, certain class discovery is to be made available to claimants who choose to

represent themselves or be represented by other counsel.

g. Claimants are afforded the right to be represented by counsel of their own choosing at any stage of the proceedings.

h. The claims procedure provides for expedited and extensive discovery of relevant information during the initial evaluation and settlement phase of the claims procedure.

i. Defendant may be held liable for all costs and expenses incurred by successful claimants during the claims procedure including costs and attorneys' fees for successful claimants at the hearing stage, Stage III, of the procedure.

Defendant's contention that the claims procedure did little more than preserve for the class the same rights they would have had if the case had never

been brought or if the class aspects of the case had been dismissed without prejudice is totally disingenuous. (See Deft's Memo. at p. 10.) Defendant is fully aware that, were it not for the present litigation, the right of nearly every class member to file a charge of discrimination before the EEOC based on discrimination between February 9, 1973 and December 31, 1979, would have been totally extinguished because of the applicable 180-day statute of limitations. 42 U.S.C. §2002-5(e); Rodriguez v. Southern Pacific, 18 EPD ¶8932 (9th Cir. 1978); Wiltshire v. Standard Oil of California, 447 F. Supp. 756, 758 (N.D. Cal. 1978). Furthermore, the chances that class members could find an experienced Title VII attorney willing to accept their individual cases on a contingent fee basis would have been virtually nonexistent, absent the claims procedure. In reality, virtually none of

the class members filing claims would ever have proceeded to litigate their claims in Federal District Court.

Defendant's criticism that the settlement does not include claims concerning discrimination in departments other than Traffic and Marketing/ Sales is absurd since the class was limited to females in the Traffic and Marketing/Sales Departments. Even if Plaintiffs had proceeded to trial and prevailed on the merits, claims outside the Traffic and Marketing/ Sales Departments undoubtedly would have been excluded. It is noteworthy, however, that class members are entitled to file claims concerning transfer and promotion opportunities from the Traffic and Marketing/Sales Departments to any other department in Delta Air Lines.

Equally absurd is Defendant's contention that the claims procedure is weakened by the absence of a settlement

fund. Had there been a fund there would have been an absolute limitation on the amount of money that could be paid to claimants. Under the negotiated procedure, the amount that may be paid out is open-ended, affording claimants the opportunity to obtain full monetary relief, without regard to any ceiling on payments.

Defendant also focuses on Plaintiffs' failure to achieve through settlement a procedure by which claimants would bring with them to the trier of the fact an initial presumption that they had been the victims of discrimination (as mandated for Stage II proceedings after trial on liability issues in Teamsters v. U.S., 431 U.S. 24 (1977)). Thus, Defendant contends, the claimant in the claims procedure, unlike the claimant in a Stage II proceeding, bears the same burden of pleading and proving disparate treatment in accordance with McDonnell Douglas v.

Green, 411 U.S. 792 (1973), as the Plaintiff in an individual Title VII action.

Obviously Plaintiffs would have preferred a claims procedure which placed the initial burden of proving non-discrimination on Defendant. A review of the settlement correspondence indicates that Plaintiffs' counsel attempted to obtain such a procedure. However, Plaintiffs' counsel ultimately decided to yield to Defendant on this point, after concluding that an initial presumption in favor of the claimant had little more than symbolic value, as under the applicable case law it could be rebutted by Defendant's mere articulation of legitimate business reasons for the disputed actions. Similar judgments have obviously been made by counsel in numerous other settlements where Plaintiffs have been found to be prevailing parties. See, e.g., Westerlund v. Fireman's Fund, (C-75-1639 WAI N.D.

Cal. 1980) and Budreck v. Crocker Bank, (C-75-1100 CBR N.D. Cal. 1978). In both of these cases the claims procedure allocates burdens of proof in accordance with McDonnell Douglas v. Green, supra.

Defendant's contention that Plaintiff's entitlement to attorneys' fees should be affected by the "low number of claims filed" is clearly without merit. Compensation for processing of claims is dealt with separately in the settlement decree, and is not the subject of Plaintiffs' fee petition. Plaintiffs in this motion are requesting compensation for work performed up until the settlement was reached, not for the processing of claims.

Nor does the number of claims filed have any bearing on Plaintiffs' status as a prevailing party. A review of the claim ratios in other recent Title VII litigation underscores the fact that low claim rates are characteristic in all claims

proceedings. See, e.g., Budreck v. Crocker Bank, supra, where two hundred sixty-two (262) claims were filed from a class of approximately 16,000; Taberoff and EEOC v. Farmer's Insurance Company, C-74-1108 (D.C. Cal. 1978) where six hundred sixty-two (662) claims were filed from a base of over 20,000 class members; and four hundred seven (407) claims out of which one hundred ninety-three (193) were rejected as frivolous, from a class of 20,000 in Westerlund v. Fireman's Fund Insurance company, supra. The Court may take judicial notice of the fact that headquarter offices for Firemans' Fund and Crocker are in California, a state where female employees are highly aware of their rights under Title VII. In the instant case, the company headquarters are located in Atlanta Georgia, and the bulk of the company's employees likewise are employed in the South. These factors may well

serve to explain a somewhat lower claims ratio than was experienced in the Westerlund and Budreck cases.

That it is simply unfair to penalize Plaintiffs' counsel for the number of claims filed, after a successful settlement has been reached, is underscored by the opinion expressed by experienced EEOC counsel. As was stated by Mr. Fritz Wollett, an attorney with the Equal Employment Opportunity Commission, in his Affidavit in Support of Plaintiff' Opening Memorandum:

> "Mr. Magaro's request for attorney's fees should be evaluated and determined primarily by the skill and effort which he utilized in preparing plaintiffs' class for trial, not by the number of claims filed by class members in a Teamsters-mandated claims procedure, a factor obviously beyond plaintiffs' control. Based upon my personal familiarity with this case I believe that Mr. Magaro has prepared the Delta Air Line case for trial in a competent and thorough manner and that the settlement is fully consistent

> with the relief available in a Title VII class action and the facts of his particular case.
>
> While it is my understanding that only a small number of claims have been filed by class members this should not inure to Mr. Magaro's detriment. Indeed if the relief gained is to be used at all to measure the size of Mr. Magaro's fee, the apparent stimulus that this lawsuit has given Delta to comply with Title VII as evidenced by the increased promotional opportunities for its female employees since the filing of this action strongly suggests that the benefits for class members resulting from this action are substantial and justify the requested fee."
> (Wollett Decl. p. 5:3-21.)

In short, the number of claimants is simply irrelevant to the Court's determination concerning a reasonable fee.

2. Changes in the Job Description and Bidding Procedure for the Customer Service Agent Position

As shown in Plaintiff's Opening Memorandum (Plaintiffs' Memo, p. 19-20), the Customer Service Agent (CSA) job has been predominantly male throughout the period

of this litigation. It is one of two basic entry-level positions in the Stations Department, and it affords significant promotional opportunities in lines of progression different from those existing in the Traffic and Marketing/Sales Departments. One of the basic objectives of Plaintiffs in bringing this lawsuit was to enhance the opportunities of female employees working in the Traffic Department, primarily those in the Reservations Sales Agent position, to work in the Stations Department beginning at the entry-level CSA position.

The record reflects that persons employed in the CSA position may be assigned to one of several functional work areas, frequently on a more or less permanent basis. One of these functional work areas is the ticket counter at the airport. Other functional areas include

operations (ramp), cargo, fueling and gates.

The CSA position has been a "bid" position since the 1973 settlement agreement with the U. S. Government. However, the job announcement that was posted, from 1973 until this Settlement Agreement, when vacancies in the CSA position occurred, contained no reference to ticketing and gate assignments for CSA positions. (See Deft's Ex. C-1.) Rather, the announcement limited its description of CSA duties to the ramp, fueling and cargo functions, and emphasized the physical aspect of the job, including a 70-pound weight lifting requirement. Thus, although frequently specific openings would be for a gate or ticker [sic] counter assignment, the job assignment provided absolutely no clue to that fact. Thus, prior to the Settlement Agreement, an interested bidder could only determine the functional work area by sub-

mitting a bid, and being selected to fill the position. During the selection process, an interested bidder would be excluded from any further consideration if he or she was unwilling to accept work assignments in all functional areas, or failed to meet the weight lifting requirement.

The new job announcement, (See Deft's Ex. C-2) which eliminates the 70-pound weight lifting requirement and describes the ticketing and gate aspects of the job, represents a significant change, designed to encourage class members to bid on Stations Department positions. Additionally, the new procedure provides a mechanism for the prospective bidder to determine in advance of submitting a bid, the function for which the vacancy exists. Thus, a potential bidder who desires to work at the ticker [sic] counter or gate needs only to call the telephone number

indicated on the announcement in order to ascertain the job assignment, rather than go through the entire bidding process, only to determine, if ultimately the successful bidder, that she did not want the assignment for which the vacancy existed.

Defendant's contention that the changes in the job announcement are merely cosmetic, since the actual duties of the CSA positions were "common knowledge among the employees" is contrary to Plaintiff's counsels' experience in this litigation. As is indicated in Gerald Magaro's Supplemental Declaration, female Reservations Sales Agents did not realize that the CSA job position could include a permanent ticketing or gate assignment. The new procedure will dispel confusion and give interested bidders relevant information concerning the CSA job opening.

Defendant's contention that the failure of the Settlement Agreement to address promotional opportunities in the Stations Department weakens it is absurd. First of all, the class does not include any female employees in the Stations Department. Thus, promotions in that department are not directly at issue. More importantly, however, discovery in this case demonstrated that the problem related to "exclusion" of women from entry-level positions in the Stations Department, not to promotional opportunities for the miniscule number of females who managed to obtain entry-level positions in the Stations Department. Thus, Plaintiffs can hardly be faulted for their failure to achieve through settlement a solution to a problem -- promotional opportunities for females in the Stations Department -- which Plaintiffs have never alleged to exist. Only when a significant

number of women obtain entry-level positions in the Stations Department will promotional opportunities for women in that department become an issue. Should it become apparent in the future that women in CSA positions are being discriminated against with respect to promotional opportunities, this can be the subject of another lawsuit.

D. The Centralized Claim Process/Ombudsman Procedure Goes Beyong the Company's "Open Door" Policy.

Defendant contends that the decentralized complaint process established by the Settlement Agreement largely duplicates the so-called "open door" policy in effect prior to this action. That policy permits the employees to meet with any management official in the company to voice complaints against company policies or local supervisors and managers. As is indicated in the Supplemental Declaration of Gerald Magaro filed herewith, however,

Defendant's position in this regard was not sustained by information obtained through discovery. First of all, the "open door" policy provides no assurances of confidentiality. Secondly, the policy is not directed toward sex discrimination, but rather is simply a generalized mechanism for voicing employee complaints. Thirdly, the management officials who hear complaints pursuant to the "open door" policy are provided with no directives concerning the elements of a bona fide sex discrimination complaint. For this reason, as well as for other reasons, frequently related to their personal career ambitions, these officials almost inevitably support local management. As a result, persons utilizing the "open door" policy have frequently found themselves either on probation or terminated shortly thereafter. Faced with these adverse conditions, it is no wonder that class

members, despite the merits of their discrimination claims, rarely exercised their rights under the so-called "open door" policy unless matters had reached such a state that they were close to termination in any case and had nothing to lose.

The decentralized complaint procedure established by the Settlement Agreement represents a significantly improved mechanism for the handling of sex discrimination complaints. First of all, the process is specifically designed for the handling of sex discrimination complaints, and personnel staff members who have received specialized training concerning the requirements of Title VII and other equal employment laws are specifically designated to handle the complaints. Secondly, the complainant has the opportunity to voice her complaints with assurances of total confidentiality. Ob-

viously if she requests a full investigation of the complaint it will become necessary for her name to be disclosed in the process. However, the initial assurances of confidentiality are significant because they afford the complainant the opportunity to obtain a preliminary judgment from the designated staff member as to the possible merits of her claim without alerting local management to the fact that she has made the claim.

Third, the Settlement Agreement specifically provides that the staff members assigned to investigate the matter shall not be adversely affected by the substance of any report or recommendation made as a result of the investigation. Thus, the investigator is free from the career advancement and other pressures that might otherwise result in automatic support of local management policies, no matter how discriminatory.

Finally, the agreement provides that an explanation of this procedure shall be given to all class members. Thus, the mere giving of this explanation concerning the procedure emphasizes to class members that Delta has an internal mechanism for handling sex discrimination claims. This explanation in itself goes far beyond the prior notification to all employees of the existence of a so-called "open door" policy.

E. The Absence of Goals and Timetables from the Settlement Agreement Does Not Negate Plaintiffs' Status as a Prevailing Party.

Defendant places great emphasis on Plaintiffs' failure to obtain as part of the Settlement Agreement goals and timetables for the promotion of female employees. Plaintiffs readily concede that they initially sought goals and timetables as a part of the settlement. However, upon careful examination, it became ap-

parent to Plaintiffs' counsel that certain characteristics of Delta's employment structure, as herein described, together with the catalytic effect of the lawsuit itself, described infra in Section III(F), combined to render goals and timetables relatively unimportant.

Delta's employment structure differs radically from that of a typical corporate Defendant in a Title VII action. First of all, Delta's management functions are highly centralized in Atlanta Georgia. Thus, although there are six divisions in the company, 4/ each with five or more departments, personnel outside of the Atlanta headquarters operation are employed exclusively in the Stations Department of the Operations-Passenger

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4/ General Counsel and Secretary, Marketing, Operations, Operations-Passenger Service, Personnel, Finance and Treasurer.

Service Division, and in the Traffic and Marketing/Sales Departments of the Marketing Division. Secondly, even within the Stations, Traffic, and Marketing/Sales Departments, management functions above the level of manager are performed exclusively in Atlanta. Finally, even within the departments operating outside of the Atlanta headquarters office, the employment structure is heavily weighted toward entry-level positions. Typically, there is no more than one position above the level of Reservations Supervisor in a given Reservations Office. Thus, it can be expected that there will be very few openings in a given year, nationwide, for positions in reservations above that of Reservations Supervisor. The structure in the Stations Department is extremely similar. Although the Marketing Department is structured somewhat differently, promotional opportunities above the level

of Marketing Representative, Senior Marketing Representative, and Account Executive also are few.

Given Delta's organization and structure, it appeared that the only promotional opportunities to which the majority of class members could reasonably aspire were those in the three departments operating outside of the Atlanta headquarters -- Traffic, Marketing/Sales, and Stations. Thus, if goals and timetables were to be appropriate at all, they would need to be limited to these three departments.

The Stations Department, as noted above, has historically been virtually entirely male. Thus, goals and timetables, if appropriate at all, would appropriately be directed toward entry-level positions in the department. To a lesser degree the Marketing Department a historically been male-dominated. No

significant disparities appeared in the rates of promotion for men and the few women in the department from the entry-level Marketing Representative position to the higher management positions. Thus, in Marketing as well, goals and timetables, if appropriate at all, would logically have been limited to the entry-level Marketing Representative position. It was only in the Traffic Department, the department in which more than 90% of all class members, nationwide, are and have been employed, that women in the qualified labor pool appeared to be obtaining significantly fewer than their proportional share of promotions. This pattern was observable, moreover, only with respect to promotions to the first and second line supervisory positions (Assistant Supervisor and Supervisor). (See Plaintiffs' Exhibits 54(a) and 54(b), attached hereto as Exhibits B-1 and B-2.) The data indi-

cated that from the pool of qualified personnel, Supervisor and above, female employees were receiving their proportionate share of promotions to the few openings available in a given year, nationwide.

Given the foregoing employment patterns, the major focus of the lawsuit was to establish mechanisms for moving women out of the dead-end Reservations Sales Agent position, either into entry-level positions in Marketing/Sales or Stations, or into first and second line supervisory positions in Traffic, so that they would enjoy an equal opportunity to compete with males for upper-level positions in Traffic and promotional positions in Marketing/Sales and Stations.

Although Plaintiffs would have welcomed goals and timetables for first and second line supervisory positions in Traffic, and for entry-level positions in

Marketing/Sales and Stations, they concluded that their failure to obtain such goals was not critical to the success of the settlement and that other measures obtained through settlement, together with the catalyst affect of the lawsuit itself, appeared to be sufficient to achieve the same results. Thus, Plaintiffs determined that the changes in the job description and bidding procedures for the CSA position would attract more class members to this position, thereby placing them in the availability pool for promotional positions. Likewise, the posting of promotional opportunities for first and second level promotional positions in Traffic opened the process to public scrutiny, lessening the probability of discrimination by male supervisors and managers. This, combined with the fact there had been a substantial increase in the rate of promotions of women from the Reservations

Sales Agent position, (See Section III(F) infra) led Plaintiffs to conclude that while goals and timetables for promotional positions in the Traffic Department would have been desirable, they were not necessary.

Finally, although as is noted in Plaintiffs' Opening Memorandum, the Marketing Department had historically been hostile to the idea of women as Marketing Representatives, by the time settlement was reached, women appeared to be bidding in significant numbers for the relatively few openings for marketing positions, and to be obtaining these positions with as great a rate of success as their male counterparts. Thus, Plaintiffs saw no particular need for insisting on goals and timetables for marketing positions.

F. Defendant's Contentions to the Contrary Notwithstanding, The Record is Clear That This Lawsuit Has Brought About Significant Changes at Delta, Beyond Those Reflected by the Four Corners Of The Settlement Agreement.

The law is clear that the results achieved by Plaintiffs may also come about through other than the terms and conditions of the settlement itself. In this respect, several Courts have applied the "catalyst" concept. See, Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976). In Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970), Plaintiff's suit was described as the catalyst which forced Defendant to voluntarily comply with Title VII requirements. Thus, although Plaintiff did not prevail in his individual claim, the suit did force the employer into remedial action as the class and attorneys' fees were awarded, 433 F.2d at 430. Accord, Reed v. Arlington Hotel Company, Inc., 476 F.2d

721 (8th Cir. 1973). The "catalyst" principle was also recognized by the Court in Chicano Police Officers' Association, supra, where the Court noted the initial and continued impact on Defendant's employment practices.

Although Defendant goes to great lengths to obscure the facts, it is clear that there has been a significant improvement in employment opportunities for women at Delta during the pendancy of this action. Thus, a review of Defendant's Exhibit F indicates that in 1976, the year that the lawsuit was filed, women represented 81.3% of the available labor pool for promotion to Lead Agent, but only 58.5% of total promotions. Thus, women only received 71.9% (58.5& [sic] ÷ 81.3%) of the positions to which they were proportionately entitled. By 1977, the year after the lawsuit was filed, this proportion had increased to 81.8% (65.9% ÷

80.6%) and by 1978 the proportion had increased once again to 89.6% (73% + 81.9%). Thus, during the pendancy of the lawsuit, it is clear that there was a dramatic improvement in the opportunities for women to advance out of the historically dead-end position of Reservations Sales Agent. Because, as has been indicated above, women in the Reservations Sales Agent position constitute the overwhelming majority of the class, this one statistic demonstrates the beneficial affect of the lawsuit on opportunities for the majority of the class members.

A similar dramatic change appears in distribution by sex for higher level positions within the Traffic Department, an improvement even more significant, in view of the relatively few opportunities for movement into those positions over the years covered by the lawsuit. Thus, an analysis of Defendant's Trial Exhibits

(attached as Exhibit C) shows the following uniform upward trend in the proportion of women occupying supervisory and management positions in the Marketing/ Sales and Traffic Departments:

TRAFFIC

Supervisors

Year	Total	Fem.	Fem. as % of Total
1973	103	25	24
1974	105	32	30
1975	110	35	32
1976	119	44	37
1977	130	52	40
1978	153	72	47

Chief Supervisor

Year	Total	Fem.	Fem. as % of Total
1973	20	3	15
1974	22	3	14
1975	23	3	13
1976	23	4	17
1977	27	7	26
1978	30	8	27

Res. Mgr.

Year	Total	Fem.	Fem. as % of Total
1973	19	1	5
1974	20	1	5
1975	20	1	5
1976	20	3	15
1977	20	3	15
1978	19	4	21

MARKETING

Distribution by Sex of Persons in Marketing Representative Positions - (Includes Marketing Representative Trainee, Marketing Representative Cargo, Senior Marketing Representative, Senior Marketing Representative Cargo, Account Executive Marketing - Sales).

Year	Total	Fem.	Fem. as % of Total
1973	156	20	13
1974	155	19	12
1975	150	18	12
1976	153	26	17
1977	160	28	18
1978	173	37	21

In short, very likely in order to forestall the dreaded threat of Court-imposed goals and timetables, Defendant has made clear and unmistakable efforts to put its own house in order. Plaintiffs submit that the foregoing statistics constitute ample evidence of the catalyst effect of the Thornberry v. Delta action.

G. The Named Plaintiffs Have Received Substantial Relief.

Although Defendant contends that the named Plaintiffs have not prevailed in any significant manner, it is clear that the contrary is true. Since none of the named Plaintiffs is presently employed at Delta Air Lines, relief other than in the form of back-pay was clearly inappropriate. Two of the named Plaintiffs, Plaintiffs Thornberry and Farmer, have received one hundred percent (100%) of the back-pay which they would have been able to prove at trial. Although the other two named

Plaintiffs received somewhat less than they would have proved at trial had they prevailed on their termination claims, there is no dispute that the terminations claims would have been hard to prove. Thus, the settlement obtained for Plaintiffs Magel and O'Sullivan appears to have been favorable.

In this regard, Plaintiffs would call the Court's attention to the settlement in Westerlund v. Fireman's Fund, supra, a case in which Plaintiffs are clearly found to have prevailed under the applicable law. In that case the back-pay awards to eight Plaintiffs ranged from $1,500.00 to $6,000.00. Only one named Plaintiff was given a promotional opportunity. Clearly the relief obtained in this action is equivalent.

H. Plaintiffs Are Not Required to Obtain Relief On All Claims.

Defendant's contention that, because Plaintiffs did not obtain every form of relief sought for every claim in their Complaint, they are not the prevailing party, is contrary to all sound legal authority. See, e.g., Airline Pilots Assoc. v. United Airlines, 21 EPD §30,420 (E.D. N.Y. 1979) where the Court stated:

> "United next suggests that plaintiffs are not prevailing parties because they succeeded on only part of their case. The court does not agree . . . The court can find no reason why plaintiffs should be penalized for having sought additional relief . . . It is widely recog.ized that the purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to 'effectuate the congressional policy against * * * discrimination.' Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1256 (2d Cir. 1979); Johnson v. Georgia Highway Express, 588 F.2d 714, 716 (5th Cir. 1974), and that the policies of the attorney's fees provisions are 'best served by

> encouraging plaintiffs to seek the broadest relief they feel, in good faith, they are entitled to.' Palmer v. Rogers, [10 EPD ¶10,499] at 6130 (D.D.C. 1975). See also Newman v. Piggie Park Enterprises, 390 US 400 (1968)." (21 EPD at 13,393-94)

A similar result was obtained in Chicano Police Officers' Association v. Stover, supra, a case in which the class action was settled for the total sum of $16,000.00 without any injunctive or other form of relief. Rejecting the Defendant's contention that Plaintiffs were not a prevailing party because the sum paid was to avoid lengthy and costly litigation (i.e., a nuisance settlement), the Court found that Defendant's view of what constitutes a prevailing party was too narrow, stating:

> "[I]f a settlement provides some benefit to plaintiffs or some vindication of their rights, then the Congressional intent to encourage private enforcement of civil rights, see S.Rep. No. 1011, supra, at 5, will be fur-

> thered by the awarding of fees. This is true even when both sides lose something and gain something, resulting in a 'draw', as long as plaintiffs have received substantial benefits. See Dawson v. Pastrick, 600 F.2d 70, 78-79 (7th Cir. 1979). Therefore, the court must determine whether the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way. See Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979)." (Emphasis added.)

Following the same reasoning applied in the Airline Pilots Association and Chicano Police Officers' Association cases, many Courts have awarded fees to Plaintiffs who have prevailed on some but not all of their claims. Thus, in Bolton v. Murray Envelope Corp., 553 F.2d 881 (5th Cir. 1977), Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975), and Parham v. Southerwestern [sic] Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), fees were awarded to Plaintiffs who established class-wide discrimination but

failed on their individual claims. And, in Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975), the Court awarded fees when Plaintiff was successful on his individual claim but did not prevail in his class-wide allegations. Similar results have followed when Plaintiff achieved the injunctive relief she sought but was unsuccessful as to her damages claim, Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975), and when Plaintiffs prevailed on seniority rights and sick pay claims but lost on job classification and back-pay issues, Taylor v. Goodyear Tire and Rubber Co., 6 EPD ¶8696.

In sum, the applicable case law clearly demonstrates that Plaintiffs who have furthered the goals of their lawsuit in some significant way are prevailing parties, under the law, and entitled to attorneys' fees and costs. Clearly Plaintiffs, who have significantly and posi-

tively affected employment opportunities for the majority of the persons on whose behalf this action was brought, qualify as a prevailing party under this standard.

I. The Fact That Plaintiffs May Have Settled for Something Less Than They Would Have Achieved, if Successful at Trial, Does Not Affect Their Status as Prevailing Party.

In the exercise of their mandated function of overseeing and approving the settlement of Title VII actions, Courts have consistently noted that conciliation and settlement are the preferred means of resolving lawsuits brought under Title VII. Thus, as the Ninth Circuit stated in Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976):

> "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense."

This was stated by Judge Orrick, of this district:

> "The proposed settlement should be assessed in light of the principles discussed in the recent Fifth Circuit opinion in United States v. Allegheny Ludlum Industries, Inc., supra. In his thoughtful and thorough opinion, Judge Thornberry outlines the rules of law which govern the review of a settlement, particularly in a Title VII case.
>
> The decision emphatically affirms the principle that 'conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes'. 517 F.2d 846. Stated another way 'voluntary compliance is preferable to court action and . . . efforts should be made to resolve these employment rights by conciliation both before and after court action."
> Alaniz v. California Processors, Inc., 73 FRD 269, 279 (N.D. Cal. 1976).

Because of the principles favoring conciliation and settlement of employment discrimination disputes and because the very essence of a settlement is a compromise between the positions of the opposing

parties, Courts have never demanded that a settlement agreement provide every possible form of relief which might have been obtained after judgment for the Plaintiffs in contested litigation. Thus, the Seventh Circuit upheld the denial of a motion of the Equal Employment Opportunity Commission to intervene in order to challenge a proposed settlement, stating:

> "Finally, the Commission asserts that the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated. This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII. Suffice it to say that as a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation'. [citation omitted]"
> Air Lines Stewards and Stewardessess Association, Local 550

v. American Airlines, Inc., 455 F.2d 101, 109 (7th Cir. 1972).

Similarly, the Fifth Circuit noted:

> "Neither should it be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes'. [citations omitted]"
> Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

See also, Boye v. Bechtel, 20 FEP Cases 944 (N.D. Cal. 1979) and Alaniz v. California Processors, Inc., 73 FRD at 278.

As shown above, Plaintiffs have achieved most of the relief they would have hoped to have achieved at trial had they prevailed on the major issues in this case. That Plaintiffs have given up the presumption in favor of class member claimants that they would have enjoyed at

a Stage II claims procedure after prevailing at trial, does not appear an unreasonable concession when compared with the benefits obtained through settlement now, rather than by victory after trial, and possible appeal, sometime in the future.

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No. 82-192

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

DELTA AIR LINES, INC.,
Petitioner,

vs.

MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA MAGEL, on behalf of themselves and all others similarly situated,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Delta Air Lines, Inc., submits the following reply memorandum in support of its petition for a writ of certiorari in the captioned matter.

I

THE NINTH CIRCUIT BASED ITS ATTORNEY'S FEE OPINION ON ITS RULING THAT THE PLAINTIFFS' FAILURE TO PREVAIL ON MOST OF THEIR CLAIMS WAS IRRELEVANT, NOT UPON ANY FINDING THAT THE PLAINTIFFS "HAD SUCCEEDED ON THE CASE AS A WHOLE" OR THAT THE CLAIMS ASSERTED WERE NOT "FRACTIONABLE"

In their memorandum in opposition to the petition for certiorari, Respondents seek to leave the impression, without directly arguing, that the district court and Ninth Circuit determined that the various claims asserted by the plaintiffs were not fractionable, that Respondents had pre-

vailed "on the case as a whole," and that Respondents' attorneys therefore were entitled to recover for all time spent on the case. They then argue that this approach is consistent with rulings in most of the circuits, including the circuits which clearly have stated that attorneys may not be awarded fees for time spent on issues upon which they did not prevail.

The basic weakness of Respondents' argument, however, is the fact that the district court completely ignored the question of whether the claims asserted by plaintiffs below were "related" or "fractionable", assuming from the outset of its opinion, without any discussion, that plaintiffs were entitled to recover for all time reasonably spent on the case (Appendix B to Petition, at A-20 through A-22); the court then used the admittedly "limited" results only to decide how much the basic award should be *increased* to reflect the contingency of the case (Appendix B to Petition, at A-22 through A-24). The district court engaged in no discussion whatever of Petitioner's argument that hours spent on claims upon which the plaintiffs did not prevail was not a proper basis of an award, and further did not discuss in any fashion whether the claims were "related" or "fractionable". Implicit in the district court's approach is an award of fees for all time spent on a case any time it settles or any time a plaintiff prevails on even one issue, with any analysis of the results obtained being restricted to determining the size of a contingency bonus: a plaintiff who obtains next to nothing, or prevails on only one of many claims, would get 100% of the normal fee for all time spent, while a plaintiff who did better would get a 150%, 175%, or possibly a higher amount. The *least* an attorney would get, however, would be 100% of his hours at his normal rate.

The Ninth Circuit's opinion similarly contains no discussion of the nature of the various claims asserted below or of the extent to which the claims were "fractionable". These issues were deemed irrelevant because the court

found that the claims all involved "gender discrimination" and therefore were "related", making a reduction in the hours for time spent on the issues and claims upon which the plaintiffs had not prevailed inappropriate. (Appendix A to Petition, at A-7.)[1]

This approach to a fee award under Title VII is antithetical to the general rule in several circuits that no fee may be recovered for time spent on issues and claims upon which the plaintiff does not prevail. Contrary to Respondents' arguments, the Ninth Circuit did *not* apply the standards adopted by the First, Third, Seventh and District of Columbia Circuits (indeed, those decisions and the general rule they establish are not even cited), but instead adopted a rule that allows a Title VII claimant to recover a fee award for all time spent on a case, even where he does not prevail on a majority of the claims raised and litigated. This rule conflicts with rulings in other circuits, conflicts with the prevailing party requirement of Title VII's attorney's fee provision, and should be considered by this Court.

Consequently, although review of the various claims raised by Respondents below would show that many, and in fact most, of the claims were indeed "fractionable" (see Appendix G to Petition and *General Tel. Co. of the Southwest v. Falcon*, ... U.S. ....., 77 L.Gd.2d 740, 751, 102 S.Ct. ..... (1982)), the "fractionability" question is not presented to this Court by the present petition. What *is* presented is (1) the Ninth Circuit's determination that no reduction for

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[1]In a recent opinion, published after the case at bar, the Ninth Circuit held in a similar fashion that a number of claims asserted under 42 U.S.C. § 1983 all were "related" because they all involved "civil rights". The court therefore held that no reduction in hours was appropriate even though the plaintiffs did not prevail on all of the claims asserted. *Rivera v. City of Riverside*, 679 F.2d 795, 797 (9th Cir. 1982), petition for certiorari filed on July 27, 1982, 51 U.S.L.W. 3075 (No. 82-156). It is difficult to imagine any claims that would *not* be "related" under the minimal standards the Ninth Circuit appears to be applying to this test.

time spent on claims upon which the Respondents did not prevail is appropriate where the various claims all involve "gender discrimination" and (2) the district court's and Ninth Circuit's automatic allowance of all time reasonably spent on a case regardless of whether the plaintiff prevails on all or most of the claims or whether the claims upon which the plaintiff did not prevail are separate and distinct from the other claims. Although the "fractionability" question might be the proper focus of further inquiry upon remand if the Ninth Circuit's approach is determined to be erroneous, it is not involved in the questions presented by the present petition.[2]

II

RESPONDENTS' POLICY ARGUMENTS IGNORE THE STATUTORY MANDATE THAT FEES BE AWARDED ONLY TO A PREVAILING PARTY

Respondents further argue that attorneys must be compensated for all time spent on a case, regardless of whether they prevail on all or most of the claims advanced, because

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[2]This conclusion applies equally to Respondents' argument that the district court, at one point in its opinion, used the word "significant" in discussing the relief obtained. (Appendix B to Petition, at A-23.) Initially, it is difficult to square this characterization with the fact that the heart of the settlement was a claims procedure which led to a mere handful of claims (48) from the 8,700 member class, none of which resulted in the claimant obtaining any relief. Secondly, even if the relief obtained on several of plaintiffs' claims could be deemed "significant" in relation to the relief sought on those claims, the facts that *no* relief, significant or otherwise, was obtained on the vast majority of claims and issues presented, and that a number of claims admittedly were dismissed by the court during the pendency of the action, remain undisputed. It is the district court's failure to consider the latter facts, and the Ninth Circuit's ruling that they are irrelevant, that is the subject of this Petition. At most, obtaining "significant" relief on one or two claims should entitle the party to recover a fee award for time spent on those claims, possibly with a contingency bonus: it should *not* entitle him to recover for time spent on *other* claims upon which he did not prevail in any fashion.

otherwise the determination of fees could become complicated. They further argue that fee paying clients normally pay for all time spent on a case. (Respondents' Brief, at 30-32.) These arguments, besides being addressed more to the merits of the questions presented than to whether certiorari should be granted, ignore the fact that Congress clearly limited the right to a fee award under Title VII to *prevailing* parties. Although the attorney's fee provisions of Title VII were designed by Congress to compensate a plaintiff's attorney for the time reasonably spent on a matter, the statute's basic assumption is that the plaintiff *prevails* on the matter. On matters (claims) upon which the plaintiff does *not* prevail, Congress did *not* allow a fee award, and as to such matters no fee may be awarded. The statutory limitation to "prevailing parties" simply cannot be ignored by a court in a multiple claim, multiple issue case, where a plaintiff combines a number of different claims against a party and "prevails" on only a few.

From a policy standpoint, allowing fees for all time spent when the plaintiff raises a variety of "gender discrimination" issues and claims and "prevails" on only a few does *not* serve the statutory purpose of encouraging prosecution of *valid* claims and of awarding fees only to "prevailing parties." Instead, such an approach encourages abuse of class action procedures, unfair harassment of employers, and time consuming, expensive exploration of issues with no merit and no discernable benefit. As pointed out in the petition, the approach ill-serves the administration of justice, serves no useful social purpose, and is directly at odds with the prevailing party provisions of the statute. It does nothing more than unjustly enrich attorneys for unnecessarily complicating litigation by the assertion of unmeritorious claims.

The Ninth Circuit's adoption of this approach in the opinion below is contrary to authority in other circuits, raises substantial questions of federal law and policy, and potentially impacts on areas of practice in the federal courts outside the Title VII and employment discrimination area.[3] The propriety of the ruling is a fit and proper subject for this Court's consideration, and the petition for certiorari on the attorney's fee issue should be granted.

III

TITLE VII DOES NOT MODIFY THE SCOPE OF COSTS RECOVERABLE IN LITIGATION UNDER THE ACT EXCEPT FOR ITS ALLOWANCE OF A REASONABLE ATTORNEY'S FEE AS A PART OF THE OTHERWISE RECOVERABLE COSTS

On the second question presented for review in the petition—whether district courts have authority to award as "costs" litigation expenses not specified in 28 U.S.C. § 1920—Respondents simply argue that the attorney's fee provision of Title VII provides authority for such an award and that civil rights cases are subject to different rules than cases arising under other statutes with similar attorney's fee provisions. These arguments simply define the issue presented. As indicated in the petition, they conflict with the statute, with authority in this Court, and authority in other circuits as well.

Title VII's attorney's fee provision simply states that the district court, in its discretion, "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 2000e-5(k). As noted in *Chapman v. Pacific Telephone & Telegraph Co.*, 456 F.Supp. 77 (N.D. Cal. 1978), "[T]here is no special provision in Title VII for

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[3]Indeed, the Ninth Circuit recently applied its theory in an antitrust action arising under the Clayton Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1312 *et seq.* (9th Cir. 1982).

costs above those normally taxable under Rule 54(d)." *Id.* at 83-84. Furthermore, as Respondents' attorneys argued below, and as plaintiffs' attorneys frequently have argued in other cases, the Senate Judiciary Committee, in discussing the Attorney's Fee Award Act of 1976, indicated that awards under the Act should be governed "by standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . ." Senate Report No. 94-1011, 94th Cong., 2nd sess. 6 (1976). In this respect, the Clayton Act has a prevailing party attorney's fee provision nearly identical to that contained in Title VII. 15 U.S.C. § 15. In the antitrust area, however, the courts have held without significant exception that statutes allowing a prevailing party an award of attorney's fees as a part of the costs do *not* allow awards for litigation expenses beyond normal statutory costs. *See, e.g., Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 223-24 (9th Cir. 1964) and other authorities at 13-14 nn. 9, 10 of Petition. That Congress understands the limitations of this type of statute is shown by the attorney's fee provisions of the Clean Air Act, in which Congress grants a more expansive authority to the district courts by allowing them to award the "costs of litigation (including reasonable attorney and expert witness fees)." 42 U.S.C. §§ 7604(d), 7607(f). Failure to include such a clause in Title VII is a clear indication of Congress' intent not to expand the scope of recoverable costs in Title VII actions except for the allowance of a reasonable attorney's fee. Thus, the attorney's fee allowance of the statute does not support an award of expenses beyond statutory costs, neither by its terms, nor by its legislative history, nor by analogy to other, similarly worded statutes.

Respondents' argument that a different rule applies to civil rights cases than to other cases with respect to the recovery of expenses, apart from ignoring the statute and the legislative history, is simply wrong. Initially, the assertion that the petition does not cite any civil rights cases in

support of its legal position (Respondents' Brief 42) is false: at least two cases cited in the Petition are employment discrimination and civil rights cases.[4] Other cases could be cited as well, particularly in the district courts. The latter courts, affected by the split in the circuits, have varied widely in their "cost" awards, most of which are handed down without discussion or explanation. It is the split in the circuits, and the resulting confusion and inconsistent results in the district courts, that justify the grant of certiorari on the cost question.

It also is worth noting, however, that the decisions of the lower court and the Ninth Circuit are not premised on the argument that a different rule applies in civil rights cases than applies under other prevailing party statutes. The district court based its award of non-statutory expenses on its "inherent equitable powers" (Appendix B, at A-29) and its "discretion" (Appendix B, at A-31), not upon the fact that the case was a civil rights or employment discrimination action. The Ninth Circuit likewise affirmed on the basis that, *as a general rule,* it is within the discretion of the trial court to award expert, consultant and other out-of-pocket expenses that are attributable to "the reasonable needs of the party in the context of the litigation," not upon the ground that the recovery of costs under prevailing party statutes in civil rights cases is in some fashion governed by different standards than recovery of costs under identically worded statutes in other areas. (Appendix B to Petition, at A-8 through A-10.) The breadth of the Ninth Circuit's ruling, and its potential impact on litigation outside the Title VII area, are further reasons for granting certiorari on the "recoverable cost" question presented by the petition.

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[4] *Kinsey v. Legg Mason Wood Walker,* 23 FEP Cases 774, 777 (D.D.C. 1978), *aff'd,* 605 F.2d 572 (D.C. Cir. 1979) (Title VII case); *Wehr v. Burroughs Corp.,* 477 F.Supp. 1012, 1022 (E.D. Pa. 1979), *aff'd,* 619 F.2d 296 (3rd Cir. 1980) (action under Age Discrimination in Employment Act).

CONCLUSION

The issues raised in the petition for certiorari present significant questions of federal law and policy and have a direct and substantial impact on practice in the federal courts. They are issues upon which the circuits disagree, causing substantial confusion and conflicting results in the district courts. The questions clearly are worthy of this Court's consideration. Delta's petition for a writ of certiorari therefore should be granted on both issues presented.

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Respectfully submitted,

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